

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CHRISTOPHER L. AYERS,

Plaintiff,

v.

9:20-CV-51
(GTS/TWD)

LT. SCARLOTTA, RICHARD MILLER,
CORRECTIONS OFFICER MCFERRIN,

Defendants.

APPEARANCES:

CHRISTOPHER L. AYERS
Plaintiff, *pro se*
97-A-1592
Sullivan Correctional Facility
Box 116
Fallsburg, New York 12733

HON. LETITIA JAMES
Attorney General for the State of New York
Attorney for Defendants
The Capitol
Albany, NY 12224

OF COUNSEL:

LAUREN ROSE EVERSLY, ESQ.
Assistant Attorney General

THÉRÈSE WILEY DANCKS, United States Magistrate Judge

ORDER AND REPORT-RECOMMENDATION

Christopher L. Ayers (“Plaintiff”), a former inmate in the custody of the New York State Department of Corrections and Community Supervision (“DOCCS”), commenced this *pro se* civil rights action under 42 U.S.C. § 1983, asserting claims arising out of his incarceration at Great Meadow Correctional Facility (“Great Meadow CF”). (Dkt. No. 50.) Plaintiff served

Lieutenant Scarlotta and Officer McFerrin (collectively “Defendants”)¹ with the second amended complaint and they now move for summary judgment, in lieu of an answer, pursuant to Rule 56 of the Federal Rules of Civil Procedure. (Dkt. No. 58.) In short, Defendants argue Plaintiff did not file a grievance related to the allegations contained in his second amended complaint and therefore failed to exhaust his administrative remedies. (Dkt. No. 58-1.) Plaintiff did not respond to Defendants’ motion for summary judgment, thus leaving the Court to consider the motion unopposed. For the reasons set forth below, the Court recommends that Defendants’ motion be granted.

I. DISCUSSION

a. Background

In his second amended complaint, Plaintiff alleges that, while incarcerated at Great Meadow CF, defendant Scarlotta directed defendants Miller and McFerrin to handcuff Plaintiff and beat him. (Dkt. No. 50 at 6.) The District Court construed Plaintiff’s second amended complaint as alleging Eighth Amendment excessive force claims against McFerrin and Miller and failure to protect claims against Scarlotta. (Dkt. No. 51.)

As noted above, only Defendants Scarlotta and McFerrin have been served and those defendants now bring a motion for summary judgment in lieu of an answer. (Dkt. No. 58.) In their motion, Defendants argue Plaintiff’s “claims are the proper subject for a grievance under the applicable grievance procedures; yet, [he] did not file a grievance regarding his allegations against defendants in this action.” (Dkt. No. 58-1 at 10.) In a declaration filed in connection

¹ As noted in the District Court’s December 1, 2020, Text Order, the summons for the defendant identified as Corrections Officer Richard Miller was returned unexecuted on November 17, 2020. As such, this defendant has not appeared in this case or joined in the motion for summary judgment.

with their motion, Alexandria Mead, the Inmate Grievance Supervisor at Great Meadow C.F., asserts that Plaintiff was incarcerated at the facility between October 16, 2018, and November 5, 2019, and did not file any grievances related to the allegations of excessive force against Defendants. (Dkt. No. 58-3 at ¶ 18.) Accordingly, Defendants argue the Court should dismiss the second amended complaint for failure to exhaust. (Dkt. No. 58-1.)

b. Standard of Review

1. *Plaintiff's Failure to Respond to Defendants' Statement of Material Facts*²

While courts are required to give due deference to a plaintiff's *pro se* status, that status "does not relieve [a *pro se*] plaintiff of his duty to meet the requirements necessary to defeat a motion for summary judgment." *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 50 (2d Cir. 2003). As noted above, Plaintiff failed to file *any* response to Defendants' summary judgment motion. Importantly, he has failed to challenge the statement of material facts filed by Defendants in the manner required under N.D.N.Y. L.R. 7.1(a)(3).³

Where, as in this case, a party has failed to respond to the movant's statement of material facts in the manner required under L.R. 7.1(a)(3), the facts in the movant's statement to which the plaintiff has not properly responded will be accepted as true (1) to the extent that they are

² The Local Rules were amended effective January 1, 2021. In the amendment, L.R. 7.1 was dissected and various subsections were renumbered and relocated to correspond with the appropriate Federal Rule. The relevant substance of the rules did not change. In the currently operative version of the Local Rules, L.R. 56.1 deals with summary judgement motions. However, because these motions were filed in 2020, the Court refers to the Local Rules as they existed at that time.

³ Local Rule 7.1(a)(3) requires the opposing party to file a response to the movant's Statement of Material Facts. Under the rule, the response "shall mirror the movant's Statement of Material Facts by admitting and/or denying each of the movant's assertions in matching numbered paragraphs. Each denial shall set forth a specific citation to the record where the factual issue arises." N.Y.N.D. L.R. 7.1(a)(3).

supported by evidence in the record, and (2) provided that the nonmovant, if proceeding *pro se*, has been specifically advised of the possible consequences of failing to respond to the motion.⁴ See *Champion v. Artuz*, 76 F.3d 483, 486 (2d Cir. 1996).

Accordingly, the facts set forth in Defendants' Statement of Material Facts (Dkt. No. 58-2) that are supported by record evidence and are uncontroverted by nonconclusory allegations in Plaintiff's second amended complaint and verified opposition submissions will be accepted as true. See *McAllister v. Call*, No. 9:10-CV-610 (FJS/CFH), 2014 WL 5475293, at *3 (N.D.N.Y. Oct. 29, 2014) (finding allegations in plaintiff's verified complaint sufficient to controvert facts in statement of material facts on motion for summary judgment); *Douglas v. Perrara*, No. 9:11-CV-1353 (GTS/RFT), 2013 WL 5437617, at *3 (N.D.N.Y. Sept. 27, 2013) ("Because Plaintiff has failed to raise any question of material fact, the Court will accept the facts as set forth in Defendants' Statement of Facts Pursuant to Rule 7.1(a)(3) . . . supplemented by Plaintiff's verified complaint . . . as true."). As to any facts not contained in Defendants' Statement of Material Facts, in light of the procedural posture of this case, the Court is "required to resolve all ambiguities and draw all permissible factual inferences" in favor of Plaintiff. *Terry*, 336 F.3d at 137.

Moreover, the Second Circuit has ruled that "[a] district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules," including local rules relating to requirements regarding the submission of and response to statements of material facts on summary judgment motions, and to "conduct an assiduous review of the record." *Holtz*

⁴ Defendants provided Plaintiff with the requisite notice of the consequences of his failure to respond to the motion. (Dkt. No. 58 at 3.)

v. Rockefeller & Co., Inc., 258 F.3d 62, 73 (2d Cir. 2001) (citation and internal quotation marks omitted). In deference to Plaintiff's *pro se* status, the Court has reviewed the entire record.

2. *Summary Judgment Standard*

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The party moving for summary judgment bears the initial burden of showing, through the production of admissible evidence, no genuine issue of material fact exists. *Salahuddin v. Goord*, 467 F.3d 263, 272-73 (2d Cir. 2006). A dispute of fact is "genuine" if "the [record] evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248.

Only after the moving party has met this burden is the nonmoving party required to produce evidence demonstrating genuine issues of material fact exist. *Salahuddin*, 467 F.3d at 273 (citations omitted). As noted above, Plaintiff failed to respond to Defendant's motion for summary judgment. Plaintiff's failure to oppose Defendant's motion results in the admission of properly supported facts, however the Court must still ensure those facts show Defendant is entitled to judgment as a matter of law. *See Jackson v. Federal Express*, 766 F.3d 189, 194 (2d Cir. 2014) (a non-response to a summary judgment motion does not risk default because the district court must ensure that each statement of material fact is supported by the record evidence sufficient to satisfy the movant's burden of production even if the statement is unopposed) (citing *Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co.*, 373 F.3d 241, 242-46 (2d Cir. 2004) (even when a motion for summary judgment is not opposed, the district court is not relieved of its duty to decide whether the movant is entitled to judgment as a matter of law)).

c. Analysis

The Prison Litigation Reform Act of 1995 (“PLRA”), provides, in pertinent part, “[n]o action shall be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is required for “all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” *Porter v. Nussle*, 534 U.S. 516, 532 (2002). “[E]xhaustion is mandatory under the PLRA and . . . unexhausted claims cannot be brought in court.” *Jones v. Bock*, 549 U.S. 199, 211 (2007); *see also Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (stating that the mandatory language of § 1997e(a) forecloses judicial discretion to craft exceptions to the requirement). To properly exhaust administrative remedies under the PLRA, inmates are required to complete the administrative review process in accordance with the rules applicable to the institution to which they are confined. *Jones*, 549 U.S. at 218 (citing *Woodford v. Ngo*, 548 U.S. 81, 88 (2006)); *see also Amador v. Andrews*, 655 F.3d 89, 96 (2d Cir. 2011) (exhaustion necessitates “using all steps that the [government] agency holds out, and doing so properly”). Because non-exhaustion is an affirmative defense, the defendant bears the burden of showing a failure to meet exhaustion requirements. *See Jones*, 549 U.S. at 216.

DOCCS has a well-established three-step administrative review process, Inmate Grievance Program (“IGP”), which oversees the manner in which issues are resolved by affording inmates “an orderly, fair, simple and expeditious method for resolving grievances.” 7 N.Y.C.R.R. § 701.1(a). Concerns “about the substance or application of a written or unwritten policy, regulation, procedure or rule of [DOCCS],” as well as complaints of “employee misconduct meant to annoy, intimidate or harm an inmate” may be filed. *Id.* § 701.2(a)-(e).

First, an inmate must file a complaint with the facility’s IGP clerk within twenty-one calendar days of the alleged occurrence. *Id.* § 701.5(a). A representative of the facility’s inmate grievance resolution committee (“IGRC”) has sixteen calendar days from receipt of the grievance to informally resolve the issue. *Id.* § 701.5(b)(1). If there is no such informal resolution, then the full IGRC conducts a hearing within sixteen calendar days of receipt of the grievance, *id.* § 701.5(b)(2), and issues a written decision within two working days of the conclusion of the hearing. *Id.* § 701.5(b)(3).

Second, a grievant may appeal the IGRC decision to the facility’s Superintendent within seven calendar days of receipt of the IGRC’s written decision. *Id.* § 701.5(c)(1). If the grievance involves an institutional issue (as opposed to a DOCCS-wide policy issue), the Superintendent must issue a written decision within twenty calendar days of receipt of the grievant’s appeal. *Id.* § 701.5(c)(3)(ii).

Third, a grievant may appeal to CORC within seven working days of receipt of the Superintendent’s written decision. *Id.* § 701.5(d)(1)(i). CORC is to render a written decision within thirty calendar days of receipt of the appeal. *Id.* § 701.5(d)(3)(ii).

The Second Circuit has long recognized this procedure as an “available remedy” for purposes of the PLRA. *See Hall v. Cty. of Saratoga*, No. 10-CV-1120 (NAM/CFH), 2013 WL 838284, at *1-2 (N.D.N.Y. Mar. 6, 2013). Generally, if a plaintiff, as here, fails to follow each of the required steps prior to commencing an action, he has failed to exhaust his administrative remedies as required under the PLRA. *See Ruggiero v. Cty. of Orange*, 467 F.3d 170, 176 (2d Cir. 2006) (“[T]he PLRA requires proper exhaustion, which means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).” (quotation marks and citations omitted)).

Nevertheless, while the PLRA mandates exhaustion of administrative remedies, it also “contains its own, textual exception to mandatory exhaustion.” *Ross*, 136 S. Ct. at 1858. More specifically, Section 1997e(a) provides only those administrative remedies that “are available” must first be exhausted. 42 U.S.C. § 1997e(a); *Ross*, 136 S. Ct. at 1858 (“[T]he exhaustion requirement hinges on the availability of administrative remedies[.]” (quotation marks and citations omitted)). In the PLRA context, the Supreme Court has determined “availability” means “an inmate is required to exhaust those, but only those, grievance procedures that are capable of use to obtain some relief for the action complained of.” *Ross*, 136 S. Ct. at 1859 (quotation marks and citations omitted).

There are three circumstances in which a court may find a facility’s internal administrative remedies are not available under the PLRA. *Id.* at 1859-60. First, “an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates.” *Id.* at 1859. “Next, an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use.” *Id.* Finally, an administrative remedy is not “available” when “prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.” *Id.* at 1860.

The question as to whether the plaintiff has exhausted his administrative remedies is a question of law. *See Snider v. Melindez*, 199 F.3d 108, 113-14 (2d Cir. 1999). Thus, an inmate’s failure to exhaust administrative remedies is properly considered on a motion for summary judgment in lieu of an answer. *Crichlow v. Fischer*, No. 6:15-CV-06252 EAW, 2017 WL 920753, at *5 (W.D.N.Y. Mar. 7, 2017) (citing *Crenshaw v. Syed*, 686 F. Supp. 2d 234, 236

(W.D.N.Y. 2010) (granting a motion for summary judgment made in lieu of an answer where inmate failed to exhaust administrative remedies)).

Here, the record evidence establishes that Plaintiff failed to file a grievance related to the allegations that form the basis for his second amended complaint. (Dkt. No. 58-2 at ¶¶ 17-19.) Moreover, there is no evidence in the record showing the grievance procedure “operate[d] as a simple dead end” to Plaintiff, nor is there any evidence to establish an issue of fact as to unavailability due to an “opaque” administrative scheme. There also is no evidence prison administrators prevented Plaintiff from using the grievance procedure due to “machination, misrepresentation, or intimidation.” *See Ross*, 136 S. Ct. at 1859-60. Lastly, the record does not demonstrate prison administrators prevented Plaintiff from using the grievance procedure due to “machination, misrepresentation, or intimidation.” *Id.*

Therefore, given the record and considering the evidence in the light most favorable to Plaintiff, the Court finds Defendants have carried their burden to establish they are entitled to judgment as a matter of law.

Dismissal with prejudice is appropriate where the plaintiff had the opportunity to exhaust administrative remedies, failed to do so, and is unable to cure his failure to exhaust. *Berry v. Kerik*, 366 F.3d 85, 87 (2d Cir. 2004). Here, the Plaintiff’s time to file a grievance in accordance with the rules and regulations has already passed, rendering his failure to exhaust his administrative remedies incurable at this time.

As noted above, Defendant Miller has not been served with the second amended complaint and he has not yet appeared in this action apparently because he was misnamed. (See Text Order dated December 1, 2020.) However, given that Defendants’ arguments with respect to exhaustion apply with equal strength to any putative defendant who participated in the alleged

assault, the Court recommends dismissing this action in its entirety rather than providing Plaintiff an opportunity to properly name and serve a new defendant.

II. CONCLUSION

After carefully considering the record, the Court finds Plaintiff failed to exhaust his administrative remedies.

ACCORDINGLY, it is hereby

RECOMMENDED that Defendants' motion for summary judgment (Dkt. No. 58) be **GRANTED**; and it is further

RECOMMENDED that Plaintiff's complaint be **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that the Clerk provide Plaintiff with a copy of this Order and Report-Recommendation,⁵ along with copies of the unpublished decisions cited herein in accordance with *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2008) (per curiam).

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report.⁶ Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing

⁵ The Court is aware that Plaintiff has been released from prison and the recent mail from the action has apparently not reached Plaintiff. It is important to note that Plaintiff was obligated, pursuant to L.R. 10.1(c)(2) and L.R. 41.2(b), to keep the Court informed of his current address. Therefore, any issue with his receipt of Court documents is due to his own omission.

⁶ If you are proceeding *pro se* and are served with this Order and Report-Recommendation by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date the Order and Report-Recommendation was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. P. 6(a)(1)(C).

Small v. Sec'y of Health and Human Servs., 892 F.2d 15 (2d Cir. 1989) (per curiam)); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a).

Dated: April 22, 2021
Syracuse, New York



Therese Wiley Dancks
United States Magistrate Judge

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2014 WL 5475293

Only the Westlaw citation is currently available.

United States District Court,
N.D. New York.

Charles McALLISTER also known
as Charles McCallister, Plaintiff,
v.

Harold CALL, Vocational Supervisor,
Mohawk Correctional Facility, Defendant.

No. 9:10-CV-610 (FJS/CFH).

Signed Oct. 28, 2014.

Filed Oct. 29, 2014.

Attorneys and Law Firms

Charles McAllister, Westbury, NY, pro se.

Hon. [Eric T. Schneiderman](#), Office of the New York State Attorney General, The Capitol, [Keith J. Starlin](#), AAG, of Counsel, Albany, NY, for Defendant.

ORDER

[SCULLIN](#), Senior District Judge.

*1 Currently before the Court are Magistrate Judge Hummel's October 9, 2014 Report–Recommendation and Order, *see* Dkt. No. 81, and Plaintiffs objections thereto, *see* Dkt. No. 83.

Plaintiff, a former inmate who was, at all relevant times, in the custody of the New York Department of Corrections and Community Supervision, commenced this action pursuant to  [42 U.S.C. § 1983](#). In his original complaint, Plaintiff asserted claims against Brian Fischer, Lucien J. LeClaire, Patricia LeConey, Carol Woughter, and John and Jane Does. Defendants moved for summary judgment. *See* Dkt. No. 49. By Report–Recommendation and Order dated July 6, 2012, Magistrate Judge Homer recommended that this Court dismiss all claims against the named individuals and direct Plaintiff to join Harold Call as a Defendant. *See* Dkt. No.

55. This Court accepted the Report and Recommendation and Order in its entirety and directed Plaintiff to file an amended complaint to “include only one cause of action a procedural due process claim in connection with his disciplinary hearing and one Defendant hearing officer Call.” *See* Dkt. No. 58 at 4–5.

Plaintiff thereafter filed his amended complaint and requested compensatory and punitive damages. *See* Dkt. No. 64, Amended Complaint at 4. In this amended complaint, Plaintiff alleged that Defendant violated his constitutional rights under the First, Eighth and Fourteenth Amendments. *See* Dkt. No. 64, Amended Complaint at ¶¶ 33, 34, 43.

On May 9, 2014, Defendant filed a motion for summary judgment pursuant to [Rule 56 of the Federal Rules of Civil Procedure](#). *See* Dkt. No. 74. In a Report–Recommendation and Order dated October 9, 2014, Magistrate Judge Hummel recommended that this Court grant Defendant's motion in part and deny his motion in part. *See* Dkt. No. 81 at 33. Plaintiff filed objections to Magistrate Judge Hummel's recommendations. *See* Dkt. No. 83.

Where a party makes specific objections to portions of a magistrate judge's report and recommendation, the court conducts a *de novo* review of those recommendations. *See* [Trombley v. O'Neill](#), No. 8:11-CV-0569, 2011 WL 5881781, *2 (N.D.N.Y. Nov. 23, 2011) (citing Fed.R.Civ.P. 72(b)(2);

 [28 U.S.C. § 636\(b\)\(1\)\(C\)](#)). Where a party makes no objections or makes only conclusory or general objections, however, the court reviews the report and recommendation for “clear error” only. *See* [Salmini v. Astrue](#), 3:06-CV-458, 2009 WL 1794741, *1 (N.D.N.Y. June 23, 2009) (quotation omitted). After conducting the appropriate review, a district court may decide to accept, reject, or modify those recommendations. *See* [Linares v. Mahunik](#), No. 9:05-CV-625, 2009 WL 3165660, *10 (N.D.N.Y. Sept. 29, 2009) (quoting  [28 U.S.C. § 636\(b\)\(1\)\(C\)](#)).

Although Plaintiff's objections are, in most respects, general or conclusory, given his *pro se* status, the Court has conducted a *de novo* review of Magistrate Judge Hummel's Report–Recommendation and Order. Having completed its review, the Court hereby

*2 ORDERS that Magistrate Judge Hummel's October 9, 2014 Report–Recommendation and Order is ACCEPTED

in its entirety for the reasons stated therein; and the Court further

ORDERS that Defendant's motion for summary judgment is **GRANTED in part** and **DENIED in part**; and the Court further

ORDERS that Plaintiff's First Amendment claims, his Eighth Amendment claims, and his challenge to the constitutionality of Directive 4913 are **DISMISSED**; and the Court further

ORDERS that, to the extent that Plaintiff has asserted claims against Defendant in his official capacity, those official-capacity claims are **DISMISSED**; and the Court further

ORDERS that Defendant's motion for summary judgment is **DENIED** with respect to Plaintiff's Fourteenth Amendment due process claims and with respect to Defendant's qualified immunity defense; and the Court further

ORDERS that this matter is referred to Magistrate Judge Hummel for all further pretrial matters; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

REPORT-RECOMMENDATION AND ORDER¹

CHRISTIAN F. HUMMEL, United States Magistrate Judge.

Plaintiff *pro se* Charles McAllister ("McAllister"), a former inmate who was, at all relevant times, in the custody of the New York Department of Corrections and Community Supervision ("DOCCS"),² brings this action pursuant to  42 U.S.C. § 1983 alleging that defendant Harold Call ("Call"), Vocational Supervisor, Mohawk Correctional Facility ("Mohawk"), violated his constitutional rights under the First, Eighth and Fourteenth Amendments. Am. Compl. (Dkt. No. 64) ¶¶ 33, 34; 4. McAllister initially commenced this civil rights action against defendants Brian Fischer, Lucien J. LeClaire, Patricia LeConey, Carol Woughter, and John and Jane Does. Defendants moved for summary judgment. Dkt. No. 49. By report and recommendation dated July 6, 2012, (1) all claims against identified defendants were dismissed; and (2) defendant was directed to join Call, who was identified in the motion papers as a John

Doe defendant. Dkt. No. 55; Dkt. No. 58. The report and recommendation was accepted in its entirety, and McAllister was directed to file an amended complaint to "include only one cause of action—a procedural due process claim in connection with his disciplinary hearing—and one Defendant—hearing officer Call." Dkt. No. 58 at 4. McAllister thereafter filed his amended complaint wherein he requested punitive and compensatory damages. Am. Compl. at 4. Presently pending is Call's motion for summary judgment on the amended complaint pursuant to Fed.R.Civ.P. 56. Dkt. No. 74. McAllister did not respond. For the following reasons, it is recommended that Call's motion be granted in part and denied in part.

I. Failure to Respond

The Court notified McAllister of the response deadline and extended the deadline for his opposition papers on two occasions. Dkt. No. 75; Dkt. No. 77; Dkt. No. 80. Call also provided notice of the consequence of failing to respond to the motion for summary judgment in his motion papers. Dkt. No. 74-1. Despite these notices and extensions, McAllister did not respond.

*3 Summary judgment should not be entered by default against a *pro se* plaintiff who has not been given any notice that failure to respond will be deemed a default."

 *Champion v. Artuz*, 76 F.3d 483, 486 (2d Cir.1996). Thus, "[t]he fact that there has been no response to a summary judgment motion does not ... mean that the motion is to be granted automatically."  *Id.* at 486. Even in the absence of a response, defendants are entitled to judgment only if the material facts demonstrate their entitlement to judgment as a matter of law. *Id.*; FED. R. CIV. P. 56(c). "A verified complaint is to be treated as an affidavit ... and therefore will be considered in determining whether material issues of fact exist..."  *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir.1995)

(internal citations omitted); see also  *Patterson v. Cnty. of Oneida, N.Y.*, 375 F.3d 206, 219 (2d Cir.2004) (same). The facts set forth in defendant's Rule 7.1 Statement of Material Facts (Dkt. No. 74-2) are accepted as true as to those facts that are not disputed in McAllister's amended complaint. N.D.N.Y.L.R. 7.1(a)(3) ("The Court shall deem admitted any properly supported facts set forth in the Statement of Facts that the opposing party does not specifically controvert.").

II. Background

The facts are reviewed in the light most favorable to McAllister as the non-moving party. *See* subsection III(A) *infra*. At all relevant times, McAllister was an inmate at Mohawk. Am. Compl. ¶ 3.

On or about July 15, 2009, nonparty Correction Officer Femia, pursuant to authorization from nonparty Captain Dauphin, searched McAllister's personal property while McAllister was confined in a secure housing unit ("SHU").³ Dkt. No. 74-3, Exh. A, at 14; Am. Compl. ¶¶ 5-6. Femia confiscated approximately twenty documents from McAllister's locker, including five affidavits that were signed by other inmates. Dkt. No. 74-3, Exh. A, at 14. As a result of the search, Femia issued McAllister a Tier III misbehavior report, alleging violations of prison rules 113.15⁴ (unauthorized exchange) and 180.17 (unauthorized assistance).⁵ *Id.*; Am. Compl. ¶ 7.

McAllister was assigned as his inmate assistant nonparty Correction Officer A. Sullivan. Am. Compl. ¶ 7; Dkt. No. 74-3, Exh. A, at 11. McAllister requested five inmate witnesses, documents, prison directives 4933 and 4982, and a facility rule book. Am. Compl. ¶ 8; Dkt. No. 74-3, Exh. A, at 11. He also asked Sullivan for permission to retrieve documents from his personal property. *Id.* The requested witnesses were those inmates whose signatures were affixed to the five confiscated affidavits. Dkt. No. 74-3, Exh. A, at 14. Sullivan retrieved the requested materials, and all inmate witnesses agreed to testify. *Id.* at 11.

On or about July 21, 2009, a Tier III disciplinary hearing was held before Call, who served as the hearing officer. Am. Compl. ¶ 10. McAllister pleaded not guilty to both alleged violations. Dkt. No. 74-3, Exh. A, at 38. McAllister objected to the misbehavior report as violative of prison directive 4932 because the copy he was given (1) provided insufficient notice of the charges against him and (2) differed from the report that Call read into the record. *Id.* at 39-41. McAllister stated that his copy did not list the names of the inmates to whom the confiscated affidavits allegedly belonged. *Id.* Call acknowledged the difference between the reports but concluded that the misbehavior report informed McAllister of the charges against him and the bases for the charges. *Id.* at 39, 41-42. McAllister also argued that his copy of the misbehavior report referred to confiscation of twenty

documents from his cell, but did not identify the papers that were taken. *Id.* at 42. He contended that the misbehavior report's general reference to "legal work" was insufficient to provide him with notice of the documents to which the report was referring because he had several volumes of legal work. *Id.* at 42, 59. In response to this objection, Call recited the body of the misbehavior report, which described the confiscated documents as "[a]rticles of paper which appear to be legal work including some signed affidavits" and asked McAllister, "[t]hat didn't ring a bell for you? How much paperwork did you have that fit that description?" *Id.* at 42. Call also expressed his belief that the affidavits qualified as legal work. *Id.* at 45, 57-58.

*4 McAllister next argued that he did not provide unauthorized legal assistance to another inmate in violation of rule 180.17 because the inmate affidavits were used as evidence to prove that the Division of Parole had a "practice" of "fail[ing] to respond to appeals over the last four years" Dkt. No. 74-3, Exh. A at 45-49, 56. These inmates were aware that their affidavits were created for, and to be used solely in support of, McAllister's case and that they were receiving no legal benefit. *Id.* at 48-49. McAllister further contended that he did not need permission from prison personnel to collect the affidavits. *Id.* at 64.

McAllister also argued that rule 113.15 is ambiguous because it does not list the specific items which, if found in an inmate's possession, would violate the rule. Dkt. No. 74-3, Exh. A, at 54. Finally, to the extent it can be determined from the hearing transcript, McAllister objected to the SHU procedures for handling his personal property. *Id.* at 70.

At the conclusion of the hearing, Call informed McAllister that he would be considering testimony from a confidential witness. Dkt. No. 73-3, Exh. A, at 13, 38, 73. McAllister objected to consideration of confidential testimony without being informed of the contents. *Id.* at 74. Finally, McAllister declined to call the inmates that he had requested as witnesses. *Id.* at 37, 71.

Call found McAllister guilty of violating prison rules 113.15 and 180.17. Dkt. No. 74-3, Exh. A, at 8-9, 76. He imposed a penalty of three months in SHU and three months loss of privileges. *Id.* at 8. Call relied upon the misbehavior report, the confidential testimony, the packet of legal work containing the other inmates' affidavits, and McAllister's testimony and statements. *Id.* at 9.

The disciplinary determination was reversed upon administrative appeal on the ground that the evidence failed to support a finding of guilt. Dkt. No. 74-3, Exh. B, at 79; Exh. C, at 81. In May 2010, McAllister commenced this action pursuant to 42 U.S.C. § 1983.

III. Discussion⁶

McAllister argues that Call violated his rights under (1) the First Amendment, by (a) retaliating against him by finding him guilty and (b) hindering his access to the courts; (2) the Eighth Amendment, by imposing a three-month SHU assignment, plus ten additional days following reversal of the disciplinary hearing; and (3) the Fourteenth Amendment, because (a) he was given insufficient notice of the charges against him, (b) he was denied advance notice of the use of a confidential witness, (c) he was forced to spend approximately fifty-two days in SHU as a result of the misbehavior report, (d) Call failed to follow certain DOCCS directives and prison regulations, (e) Call demonstrated bias against him during the Tier III hearing and prejudged his guilt, and (f) he was denied equal protection.

A. Legal Standard

A motion for summary judgment may be granted if there is no genuine issue as to any material fact, it was supported by affidavits or other suitable evidence, and the moving party is entitled to judgment as a matter of law. The moving party has the burden to show the absence of disputed material facts by providing the court with portions of pleadings, depositions, and affidavits which support the motion. **FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).**

Facts are material if they may affect the outcome of the case as determined by substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All ambiguities are resolved and all reasonable inferences drawn in favor of the non-moving party. *Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir.1997).

*5 The party opposing the motion must set forth facts showing that there is a genuine issue for trial, and must do more than show that there is some doubt or speculation as to the true nature of the facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

For a court to grant a motion for summary judgment, it must be apparent that no rational finder of fact could find in favor of the non-moving party. *Gallo v. Prudential Residential Servs., Ltd. Partnership*, 22 F.3d 1219, 1223-24 (2d Cir.1994); *Graham v. Lewinski*, 848 F.2d 342, 344 (2d Cir.1988).

Where, as here, a party seeks judgment against a *pro se* litigant, a court must afford the non-movant special solicitude.

See *Triestman v. Federal Bureau of Prisons*, 470 F.3d 471, 477 (2d Cir.2006). As the Second Circuit has stated,

[t]here are many cases in which we have said that a *pro se* litigant is entitled to “special solicitude,” ... that a *pro se* litigant’s submissions must be construed “liberally,” ... and that such submissions must be read to raise the strongest arguments that they “suggest,” At the same time, our cases have also indicated that we cannot read into *pro se* submissions claims that are not “consistent” with the *pro se* litigant’s allegations, ... or arguments that the submissions themselves do not “suggest,” ... that we should not “excuse frivolous or vexatious filings by *pro se* litigants,” ... and that *pro se* status “does not exempt a party from compliance with relevant rules of procedural and substantive law....

Id. (citations and footnote omitted); *see also* *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 191-92 (2d Cir.2008).

B. Eleventh Amendment

Call argues that he is entitled to Eleventh Amendment immunity relating to McAllister’s claims for money damages against him in his official capacity. The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” **U.S. CONST. AMEND. XI.** “[D]espite the limited terms of the Eleventh Amendment, a federal court [cannot] entertain a suit brought by a citizen against

his [or her] own State.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (citing *Hans v. Louisiana*, 134 U.S. 1, 21 (1890)). Regardless of the nature of the relief sought, in the absence of the State’s consent or waiver of immunity, a suit against the State or one of

its agencies or departments is proscribed by the Eleventh Amendment. *Halderman*, 465 U.S. at 100. Section 1983 claims do not abrogate the Eleventh Amendment immunity of the states. See *Quern v. Jordan*, 440 U.S. 332, 340–41 (1979).

A suit against a state official in his or her official capacity is a suit against the entity that employs the official. *Farid v. Smith*, 850 F.2d 917, 921 (2d Cir.1988) (citing *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)). “Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself,” rendering the latter suit for money damages barred even though asserted against the individual officer. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Here, because McAllister seeks monetary damages against Call for acts occurring within the scope of his duties, the Eleventh Amendment bar applies.

*6 Accordingly, it is recommended that Call's motion on this ground be granted.

C. Personal Involvement

“[P]ersonal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.” *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir.1994) (quoting *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir.1991)). Thus, supervisory officials may not be held liable merely because they held a position of authority. *Id.*; *Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir.1996). However, supervisory personnel may be considered personally involved if:

- (1) [T]he defendant participated directly in the alleged constitutional violation;
- (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong;
- (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom;

(4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts; or

(5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Colon, 58 F.3d at 873 (citing *Williams v. Smith*, 781 F.2d 319, 323–24 (2d Cir.1986)).⁷ Assertions of personal involvement that are merely speculative are insufficient to establish a triable issue of fact. See e.g., *Brown v. Artus*, 647 F.Supp.2d 190, 200 (N.D.N.Y.2009).

As to any constitutional claims beyond those surrounding the denial of due process at the Tier III hearing, the undersigned notes that evaluation of such is unnecessary as it is outside of the scope set forth in this Court's prior order. Dkt. No. 58 at 4. However, to the extent that Call acknowledges these claims and provides additional and alternative avenues for dismissal, McAllister fails to sufficiently allege Call's personal involvement in impeding his access to the courts, in violation of the First Amendment. McAllister argues that, as a result of Call's determination that he violated rules 113.15 and 180.17, his legal paperwork was confiscated, which impaired his ability to continue to represent himself in pending state and federal court claims. Am. Compl. ¶¶ 38–40. However, McAllister does not suggest that Call was personally involved in either the search and confiscation of paperwork that led to the filing of the misbehavior report nor the subsequent reduction in his paperwork pursuant to directive 4913. To the contrary, McAllister concedes that the paperwork was reduced pursuant to the directive.

McAllister also fails to sufficiently allege Call's personal involvement in the SHU procedures for storing property or in holding him in SHU for ten additional days following the reversal of the Tier III determination. Call stated that he had no involvement with the storage of property in SHU. Dkt. No. 74–3, at 5. Call also contended that he “was not responsible for plaintiff's being held in SHU for additional days following the August 26, 2009 reversal of the disciplinary hearing decision of July 22, 2009.” *Id.* McAllister does not allege Call's involvement in this delay. McAllister's sole reference to the ten-day delay is his claim that he “was not released from Special Housing until September 4, 2009, approximately 10 days after the reversal” Am. Compl. ¶ 43. This conclusory statement is insufficient to demonstrate Call's personal involvement in an extension of his time in SHU

following the reversal of the Tier III determination.  *Brown*, 647 F.Supp.2d at 200.

*7 Accordingly, it is recommended that Call's motion be granted insofar as McAllister alleges that Call: denied him access to the courts in violation of the First Amendment, was at all involved with the storage of his property while he was in SHU, and caused him to be held an additional ten days in SHU following administrative reversal of the Tier III determination.

D. First Amendment

McAllister appears to argue that, in retaliation for his filing of grievances and lawsuits, Call found him guilty of the misconduct in the Tier III hearing and imposed SHU time. He suggests that his transfer to SHU, as a result of the Tier III determination, triggered enforcement of his compliance with directive 4913, which impeded his ability to proceed with active legal matters and resulted in dismissals. Am. Compl. ¶ 41. Thus, McAllister also argues that he was denied access to the courts. Am. Compl. ¶ 38. As a preliminary matter, McAllister's First Amendment retaliation and access claims are beyond the scope of the prior order of this Court directing McAllister to limit his amended complaint "include only one cause of action—a procedural due process claim in connection with his disciplinary hearing." Dkt. No. 58, at 4. Regardless, McAllister fails to plausibly allege either retaliation or denial of access to the courts.

Courts are to "approach [First Amendment] retaliation claims by prisoners with skepticism and particular care." See e.g.,  *Davis v. Goord*, 320 F.3d 346, 352 (2d Cir.2003) (citing  *Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir.2001), overruled on other grounds by  *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)). A retaliation claim under  section 1983 may not be conclusory and must have some basis in specific facts that are not inherently implausible on their face.  *Ashcroft*, 556 U.S. at 678;  *South Cherry St., LLC v. Hennessee Group LLC*, 573 F.3d 98, 110 (2d Cir.2009). To survive a motion to dismiss, a plaintiff must show "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action."  *Dawes*

v. *Walker*, 239 F.3d 489, 492 (2d Cir.2001), overruled on other grounds by  *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002);  *Taylor v. Fischer*, 841 F.Supp.2d 734, 737 (W.D.N.Y.2012). If the plaintiff meets this burden, the defendants must show, by a preponderance of the evidence, that they would have taken the adverse action against the plaintiff "even in the absence of the protected conduct."

 *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). "Types of circumstantial evidence that can show a causal connection between the protected conduct and the alleged retaliation include temporal proximity, prior good discipline, finding of not guilty at the disciplinary hearing, and statements by defendants as to their motives."

See  *Barclay v. New York*, 477 F.Supp.2d 546, 588 (N.D.N.Y.2007).

*8 Here, McAllister baldly states that Call's disciplinary determination was imposed in retaliation for his filing of grievances and lawsuits; however, McAllister does not identify these grievances and lawsuits nor does he claim that any of these were lodged against Call. See generally *Ciaprazi v. Goord*, No. 02-CV-915, 2005 WL 3531464, at *9 (N.D.N.Y. Dec. 22, 2005) (dismissing the plaintiff's claim of retaliation where the plaintiff could "point to no complaints lodged by him against or implicating the conduct of [the] defendant ... who issued the disputed misbehavior report."). McAllister also provides no time frame for the apparent grievance and lawsuits. Thus, it cannot be discerned whether or how these unnamed grievances and lawsuits were a "motivating factor" in Call's Tier III determination.

 *Doyle*, 429 U.S. at 287 (internal quotation marks and citation omitted). McAllister's unsupported, conclusory claim fails to plausibly demonstrate that Call's determination was a product of retaliatory animus.

Undoubtedly, prisoners have a constitutional right to meaningful access to the courts.  *Bounds v. Smith*, 430 U.S. 817, 824 (1977);  *Lewis v. Casey*, 518 U.S. 343, 350 (1996) ("The right that *Bounds* acknowledged was the (already well-established) right of access to the courts."). This right is implicated when prison officials "actively interfer[e] with inmates' attempts to prepare legal documents[] or file them."

 *Lewis*, 518 U.S. at 350 (internal citations omitted). To establish a denial of access to the courts claim, a plaintiff must satisfy two prongs. First, a plaintiff must show that

the defendant acted deliberately and maliciously.  [Davis v. Goord](#), 320 F.3d 346, 351 (2d Cir.2003). Second, the plaintiff must demonstrate that he suffered an actual injury. *Id.*; *Monsky v. Moraghan*, 123 F.3d 243, 247 (2d Cir.1997) (internal citations, quotation marks, and alterations omitted) (quoting *Lewis*, 518 U.S. at 329) (“In order to establish a violation of access to courts, a plaintiff must demonstrate that a defendant caused actual injury, *i.e.*, took or was responsible for actions that hindered a plaintiff’s effort to pursue a legal claim”). Thus, a plaintiff must allege that the defendant was “responsible for actions that hindered his efforts to pursue a legal claim.”  [Davis](#), 320 F.3d at 351 (internal quotation marks omitted).

Here, there is insufficient evidence to give rise to a genuine dispute of fact regarding either element of a denial of court access claim. As noted, McAllister merely states that, as a result of the property reduction pursuant to directive 4913, his “ability to continue litigation in Federal and State court caused adverse decisions by the court and dismissals.” Am. Compl. ¶ 41. This claim is insufficient to demonstrate that Call was responsible for actions that hindered his legal claims. Insofar as McAllister’s claim could be read to suggest that Call denied him access to the courts by confiscating his legal documents, as noted *supra*, McAllister fails to present any plausible facts to support a finding that Call was involved in the initial search of his property or in the later reduction of his property or that it was maliciously imposed by Call. As noted, the initial cell search which led to the misbehavior report was ordered by Captain Dauphin and executed by Correction Officer Femia. Similarly, McAllister concedes that his property was reduced pursuant to directive 4913. Although McAllister suggests that his transfer to SHU as a result of the Tier III hearing triggered the application of directive 4913, he was transferred to SHU on July 9, six days before the initial cell search occurred. *Id.* ¶ 5. Thus, if McAllister were forced to comply with directive 4913 because of his transfer to SHU, he failed to demonstrate that the compliance arose from the SHU term ordered by Call rather than the unknown incident that resulted in his transfer to SHU on July 9. Further, McAllister failed to establish any actual injury because he did not specify which cases were allegedly dismissed as a result of the property reduction. See *Monsky*, 123 F.3d at 247.

*9 Accordingly, it is recommended that Call’s motion for summary judgment be granted on this ground.

E. Eighth Amendment

In his amended complaint, McAllister references the Eighth Amendment. Am. Compl. ¶ 31. However, McAllister’s only reference to the Eighth Amendment is his assertion that Call’s use of a confidential witness violated his Eighth Amendment right to be free from cruel and unusual punishment. However, in support of this argument, McAllister states only that this right was violated when Call stated, “[s]o, um there is a lot of stuff going on through my paperwork and I want to bring it to your attention before we move on ...” *Id.* ¶ 33; Dkt. No. 74–3, at 73. When read in context, it becomes clear that Call made this statement immediately before informing McAllister of his consideration of confidential information. Dkt. No. 73–3, at 73. Although, in referencing this portion of the hearing transcript McAllister alleges that he was subject to cruel and unusual punishment, it appears that McAllister intended to assert that the use of a confidential witness was a due process violation. Even if McAllister had intended to argue that use of a confidential witness violates the prohibition of cruel and unusual punishment, such a claim would necessarily fail because the Eighth Amendment protects an inmate’s right to be free from conditions of confinement that impose an excessive risk to an inmate’s health or safety.  [Farmer v. Brennan](#), 511 U.S. 825, 834 & 837 (1994). As McAllister makes no claim that he faced conditions of confinement imposing a risk to his health or safety and instead focuses his argument on notice of a confidential witness, giving McAllister due solicitude, his claim regarding the use of a confidential witness will be incorporated as part of the due process analysis below.

F. Fourteenth Amendment

1. Due Process

Well-settled law provides that inmates retain due process rights in prison disciplinary hearings.”  [Hanrahan v. Doling](#), 331 F.3d 93, 97 (2d Cir.2003) (per curiam) (citing cases). However, inmates do not enjoy “the full panoply of rights” accorded to a defendant in a criminal prosecution.

 [Wolff v. McDonnell](#), 418 U.S. 539, 556 (1974). For a plaintiff to state a claim that he was denied due process at a disciplinary hearing, the plaintiff “must establish (1) that he possessed a liberty interest and (2) that the defendant(s)

deprived him of that interest as a result of insufficient process.” *Ortiz v. McBride*, 380 F.3d 649, 654 (2d Cir.2004) (per curiam) (quoting *Giano v. Selsky*, 238 F.3d 223, 225 (2d Cir.2001)). To satisfy the first prong, a plaintiff must demonstrate that the deprivation of which he complains is an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484 (1995). “A liberty interest may arise from the Constitution itself, ... or it may arise from an expectation or interest created by state laws or policies.” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (citations omitted).

a. Denial of Liberty Interest

*10 In assessing whether an inmate plaintiff was denied procedural due process, the court must first decide whether the plaintiff has a protected liberty interest in freedom from SHU confinement. *Bedoya v. Coughlin*, 91 F.3d 349, 351 (2d Cir.1996). If the plaintiff demonstrates the existence of a protected liberty interest, the court is then to determine whether the deprivation of this interest “occurred without due process of law.” *Id.* at 351, citing *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460–61 (1989). Due process generally requires that a state afford an individual “some kind of hearing” prior to depriving them of a liberty or property interest. *DiBlasio v. Novello*, 344 F.3d 292, 302 (2d Cir.2003). Although not dispositive, duration of disciplinary confinement is a significant factor in determining atypicality. *Colon v. Howard*, 215 F.3d 227, 231 (2d Cir.2000); *Blackshear v. Woodward*, No. 13-CV-1165, 2014 WL 2967752 (N.D.N.Y. July 1, 2014).

McAllister suggests that his confinement in SHU for forty-two to fifty-two days is a sufficient deprivation that requires procedural protections. Freedom from SHU confinement may give rise to due process protections; however, the plaintiff must allege that the deprivation imposed “an atypical and significant hardship.” *Sandin*, 515 U.S. at 484; *Gaston v. Coughlin*, 249 F.3d 156, 162 (2d Cir.2001) (concluding that SHU confinement does not give rise to due process protections where inmate failed to demonstrate atypical hardship while confined). Although the Second Circuit has cautioned that “there is no bright-line rule regarding the

length or type of sanction” that meets the *Sandin* standard (*Jenkins v. Haubert*, 179 F.3d 19, 28 (2d Cir.1999)), it has made clear that confinement in SHU for a period of one year constitutes atypical and significant restraint on inmates, deserving due process protections. See e.g. *Sims v. Artuz*, 230 F.3d 14, 23 (2d Cir.2000) (holding confinement in SHU exceeding 305 days was atypical); *Sealey v. Giltner*, 197 F.3d 578, 589 (2d Cir.1999) (concluding confinement for fewer than 101 days in SHU, plus unpleasant but not atypical conditions, insufficient to raise constitutional claim). Although the Second Circuit has generally held that confinement in SHU for 101 or fewer days without additional indicia of atypical conditions generally does not confer a liberty interest (*Smart v. Goord*, 441 F.Supp.2d 631, 641 (2d Cir.2006)), it has “explicitly noted that SHU confinements of fewer than 101 days could constitute atypical and significant hardships if the conditions were more severe than the normal SHU conditions of *Sealey* or a more fully developed record showed that even relatively brief confinements under normal SHU conditions were, in fact, atypical.” *Palmer v. Richards*, 364 F.3d 60, 65 (2d Cir.2004) (citing, *inter alia*, *Ortiz*, 323 F.3d at 195, n. 1).

The undersigned notes that it is unclear what portion of McAllister’s relatively brief time in SHU is attributable to the Tier III determination, because it appears that McAllister was already in SHU when the instant disciplinary report was filed. Am. Comp. ¶ 5; Dkt. No. 74–3, Exh. A, at 14. The undersigned also notes that there is no indication that McAllister endured unusual SHU conditions. The only reference McAllister makes to his time in SHU is that, upon his transfer to SHU, several bags of his paperwork were confiscated pursuant to directive 4913. *Id.* ¶ 37. However, review of directive 4913 reveals that the personal and legal property limit set forth in directive 4913 applies to the general prison population and inmates in other forms of segregated confinement. Dkt. No. 49–2, at 5–19. Thus, the fact that McAllister was forced to comply with directive 4913 does not indicate that he was subjected to conditions more severe than the normal SHU conditions or conditions imposed on the general prison population. Dkt. No. 74–3, Exh. A, at 14.

*11 Although the record is largely absent of detail of the conditions McAllister faced in SHU, there is also nothing in the record comparing the time McAllister was assigned and spent in disciplinary confinement with the deprivations endured by other prisoners “in the ordinary course of prison

administration,” which includes inmates in administrative segregation and the general prison population. *Welch v. Bartlett*, 196 F.3d 389, 394 (2d Cir.1999) (holding that, after *Sandin*, “the relevant comparison concerning duration is between the period of deprivation endured by the plaintiff and periods of comparable deprivation typically endured by other prisoners in the ordinary course of prison administration, including general population prisoners and those in various forms of administrative and protective custody”). Because “[t]he record does not reveal whether it is typical for inmates not being disciplined to spend similar periods of time in similar circumstances,” Call’s motion for summary judgment should be denied. *Id.* at 394 (citing *Brooks v. DiFasi*, 112 F.3d 46, 49 (2d Cir.1997)).

Accordingly, it is recommended that defendant’s motion for summary judgment on this ground be denied.

b. Procedural Due Process

Assuming a liberty interest exists, it must be determined whether McAllister was denied due process at his Tier III hearing. Where disciplinary hearings could result in SHU confinement or loss of good time credit, “[i]nmates are entitled to advance written notice of the charges; a fair and impartial hearing officer; a reasonable opportunity to call witnesses and present documentary evidence; and a written statement of the disposition, including supporting facts and reasons for the action taken.” *Luna v. Pico*, 356 F.3d 481, 487 (2d Cir.2004) (citing *Kalwasinski v. Morse*, 201 F.3d 103, 108 (2d Cir.1999)); see also *Wolff*, 418 U.S. at 556; *Sira v. Morton*, 380 F.3d 57, 59 (2d Cir.2004).

i. Notice

McAllister first appears to argue that he was denied procedural due process because the misbehavior report (1) violated unnamed DOCCS rules, regulations, and procedures, and (2) failed to provide him with adequate notice of the charges against him because it did not list the five inmates whose affidavits were confiscated and, thus, impacted his ability to prepare a defense to the charges. Am. Compl. ¶¶ 11–13, 16–17. Although inmates are entitled to advance written notice of the charges, “[t]his is not to suggest that

the Constitution demands notice that painstakingly details all facts relevant to the date, place, and manner of charged inmate misconduct” *Sira*, 380 F.3d at 72 (2d Cir.2004) (citing *Wolff*, 418 U.S. at 564). “[T]here must be sufficient factual specificity to permit a reasonable person to understand what conduct is at issue so that he may identify relevant evidence and present a defense.” *Id.*

First, to the extent that McAllister’s argues that the differing disciplinary reports violated unspecified DOCCS rules, regulations, and procedures (Am.Compl. ¶¶ 12–13), this claim must fail. A section 1983 claim is not the “appropriate forum” in which to seek review of a violation of a prison regulation. *Rivera v. Wohlrab*, 232 F.Supp.2d 117, 123 (S.D.N.Y.2002) (“a § 1983 claim brought in federal court is not the appropriate forum to urge violations of prison regulation or state law ... the allegations asserted must constitute violations of constitutional due process standards.”). Next, McAllister fails to plausibly allege the existence of a question of fact whether the difference between the misbehavior reports deprived him of the ability to identify relevant evidence so that he could prepare a defense. Although McAllister’s copy of the report was missing the names of the inmates whose affidavits were confiscated, it informed McAllister of the date, time, and location of the alleged violations; the rules alleged to have been violated; and a description of the documents that were confiscated. *Johnson v. Goord*, 305 Fed. Appx. 815, 817 (2d Cir.2009) (concluding where the inmate’s copy of misbehavior report included details of alleged violation and charges against him, a sentence missing from the inmate’s copy of report did not violate the inmate’s due process rights). It is clear that the discrepancy between the misbehavior reports did not affect McAllister’s ability to prepare and present a defense. Prior to the hearing, McAllister requested as witnesses the five inmates whose affidavits were found during the property search. Indeed, the record demonstrates that McAllister was able to both identify the documents referenced in the misbehavior report and address them at the hearing. Dkt. No. 74–3, Exh. A at 45, 47–48.

*12 Thus, because he received sufficient notice of the charges against him and was able to prepare and present a defense on his behalf, McAllister fails to raise a question of fact as to whether he was denied sufficient notice of the charges against him.

ii. Hearing Officer Bias/Pre-determination of Guilt

McAllister also contends that his procedural due process rights were violated because Call was biased against him and prejudged his guilt. The Fourteenth Amendment guarantees inmates the right to the appointment of an unbiased hearing officer to address a disciplinary charge. [Allen v. Cuomo](#), 100 F.3d 253, 259 (2d Cir.1996). An impartial hearing officer “does not prejudge the evidence” and is not to say “how he would assess evidence he has not yet seen.” [Patterson v. Coughlin](#), 905 F.2d 564, 570 (2d Cir.1990); *see also* [Francis v. Coughlin](#), 891 F.2d 43, 46 (2d Cir.1989) (“it would be improper for prison officials to decide the disposition of a case before it was heard”). However, “[i]t is well recognized that prison disciplinary hearing officers are not held to the same standard of neutrality as adjudicators in other contexts.” [Russell v. Selsky](#), 35 F.3d 55, 60 (2d Cir.1996). “A hearing officer may satisfy the standard of impartiality if there is ‘some evidence in the record’ to support the findings of the hearing.” [Nelson v. Plumley](#), No. 9:12-CV-422, 2014 WL 4659327, at *11 (N.D.N.Y. Sept. 17, 2014) (quoting [Allred v. Knowles](#), No. 06-CV-0456, 2010 WL 3911414, at * 5 (W.D.N.Y. Oct. 5, 2010) (quoting [Walpole v. Hill](#), 472 U.S. 445, 455 (1985)). However, “the mere existence of ‘some evidence’ in the record to support a disciplinary determination does not resolve a prisoner’s claim that he was denied due process by the presence of a biased hearing officer.” *See* [Smith v. United States](#), No. 09-CV-729, 2012 WL 4491538 at *8 (N.D.N.Y. July 5, 2012).

Prison officials serving as hearing officers “enjoy a rebuttable presumption that they are unbiased.” [Allen](#), 100 F.3d at 259. “Claims of a hearing officer bias are common in [inmate section] 1983 claims, and where they are based on purely conclusory allegations, they are routinely dismissed.” [Washington v. Afify](#), 968 F.Supp.2d 532, 541 (W.D.N.Y.2003) (citing cases). “An inmate’s own subjective belief that the hearing officer was biased is insufficient to create a genuine issue of material fact.” [Johnson v. Fernandez](#), No. 09-CV-626 (FJS/ATB), 2011 WL 7629513, at *11 (N.D.N.Y. Mar. 1, 2011) (citing [Francis](#), 891 F.2d at 46).

McAllister first argues that Call prejudged his guilt. He supports this contention by pointing to moments during

the Tier III hearing where Call expressed his belief that McAllister’s possession of affidavits signed by other inmates was sufficient to support a violation of prison rules 113.15 and 180.17. Am. Compl., ¶¶ 13, 15, 23–25, 36. Here, however the challenged affidavits were not evidence that Call prejudged because he had the opportunity to review the affidavits and did so at the hearing. Although McAllister disagreed with Call’s opinion that possession of such documents would be a *per se* violation of the rules, Call’s assertion of belief in this matter was an opinion he reached following his personal review of this evidence. *See Johnson v. Doling*, No. 05-CV-376, 2007 WL 3046701, at * 10 (N.D.N.Y. Oct. 17, 2007) (holding that where the “[p]laintiff was provided the opportunity to testify, [and] call and question witnesses [d]isagreement with rulings made by a hearing officer does not constitute bias”). Thus, it does not appear that Call prejudged this evidence.

*13 To support his claim that Call exhibited bias and partiality against him in the Tier III hearing, McAllister points out that, after he objected to the misbehavior report for failing to provide him sufficient notice of the documents confiscated, Call read the portion of the misbehavior report describing the documents as “[a]rticles of paper which appear to be legal work including some signed affidavits,” and stated “that didn’t ring a bell for you?” *Id.* ¶¶ 19, 32). When read in context, this statement does not establish bias on Call’s part, rather it appears to be a genuine question. Though it may be said that Call could have couched this question in a kinder manner, this statement does not demonstrate bias. Moreover, that the Tier III determination was reversed on appeal, without more, is not evidence of bias or other due process violation.

[Eng v. Therrien](#), No. 04-CV-1146, 2008 WL 141794, at *2 (N.D.N.Y. Jan. 11, 2008).

Thus, McAllister fails to plausibly allege the existence of question of fact whether Call prejudged his guilt or was otherwise biased in the Tier III hearing.

iii. Failure to Investigate

McAllister next suggests that he was denied procedural due process because Call declined to interview the law library officer. Am. Compl. ¶29. Call permitted McAllister to present testimony on his behalf and afforded him the opportunity call witnesses. Had McAllister wished to hear testimony from the law library officer, he could have requested the law library officer as a witness. [Wolff](#), 418 U.S. at 566

(inmates have a right to call witnesses in their defense at disciplinary hearings). That Call found it unnecessary to independently interview the law library officer—especially where McAllister did not demonstrate that his testimony would be relevant—does not result in a denial of due process because “[t]here is no requirement ... that a hearing officer assigned to preside over a disciplinary hearing conduct an independent investigation; that is simply not the role of a hearing officer.” *Robinson v. Brown*, No. 9:11-CV-0758, 2012 WL 6799725, *5 (N.D.N.Y. Nov. 1, 2012).

Accordingly, McAllister fails plausibly raise a due process violation based on Call's alleged failure to investigate.

iv. Confidential Witness

To the extent it can be discerned, McAllister contends that he was denied due process because Call relied on confidential witness testimony, yet failed to provide him with advance notice of the confidential witness and refused to inform him of his or her identity or the nature of the testimony. Am. Compl. ¶¶ 30–34. The Second Circuit has held that a hearing officer must perform an independent assessment of a confidential informant's credibility for such testimony to be considered reliable evidence of an inmate's guilt.   *Sira*, 380 F.3d at 78 (noting that, “when sound discretion forecloses confrontation and cross-examination, the need for the hearing officer to conduct an independent assessment of informant credibility to ensure fairness to the accused inmate is heightened.”).

*14 Here, the record provides no indication that Call independently assessed the credibility and reliability of the confidential witness. The confidential witness form merely states that Call “was provided confidential information relating to the misbehavior report .” Dkt. No. 74–3, at 13. Similarly, Call does not provide whether or how he performed an assessment of the witness's credibility. *Id.* at 4. Therefore, there exist questions of fact whether Call deprived McAllister of due process by relying on this testimony without an independent assessment of the witness's credibility.

To the extent that McAllister argues that he was denied due process by Call's decision to refuse to disclose the content of the confidential witness's testimony, the law in this circuit provides that where a prison official decides to keep certain witness testimony confidential, he or she “must offer a reasonable justification for their actions, if not

contemporaneously, then when challenged in a court action.”

  *Sira*, 380 F.3d at 75 (citing  *Ponte v. Real*, 471 U.S. 491, 498 (1985)). Although “[c]ourts will not readily second guess the judgment of prison officials with respect to such matters ... the discretion to withhold evidence is not unreviewable....” *Id.* (citations omitted). Here, Call failed to provide his rationale for refraining to share the substance of this testimony, stating merely that McAllister could not be told the substance of the testimony because “it is by definition it is ... confidential.” Dkt. No. 74–3, at 74. As Call presented no reason to justify withholding the identity or substance of the confidential witness's testimony, McAllister presents a viable due process claim based on the nondisclosure of this evidence.   *Sira*, 380 F.3d at 76.

Accordingly, Call's motion for summary judgment should be denied on this ground.

v. Some Evidence

“Once a court has decided that the procedural due process requirements have been met, its function is to determine whether there is some evidence which supports the decision of the [hearing officer].”  *Freeman v. Rideout*, 808 F.2d 949, 954 (2d Cir.1986) (citations omitted). In considering whether a disciplinary determination is supported by some evidence of guilt, “the relevant question is whether there is any evidence in the record [before the disciplinary board] that could support the conclusion reached by the disciplinary board.”  *Superintendent v. Hill*, 472 U.S. 445, 455–56 (1985) (citations omitted);   *Sira*, 380 F.3d at 69. The Second Circuit has interpreted the “some evidence” standard to require “reliable evidence” of guilt.  *Luna*, 356 F.3d at 488.

In making his determination, Call relied upon McAllister's testimony and statements, testimony of a confidential witness, the misbehavior report, and the legal documents confiscated during the property search. Dkt. No. 74–3, at 4. As noted, based on the record provided, Call did not perform an independent assessment of the witness's credibility. Thus, Call's reliance on confidential testimony would be insufficient to support a finding of guilt.  *Taylor v. Rodriguez*, 238 F.3d 188, 194 (2d Cir.2001) (determining that reliance on confidential informant's testimony insufficient to provide

“some evidence” of guilt where there was no independent examination of indicia relevant to informant’s credibility). The remaining evidence relied upon—McAllister’s testimony, the misbehavior report, and the affidavits—does not constitute some evidence of guilt, as required by the Due Process clause.

*15 The affidavits alone do not constitute some evidence of guilt because mere possession of affidavits signed by other inmates would not violate prison rules 113.15 and 180.17 were it true that these documents were McAllister’s property and drafted solely for his benefit. Similarly, although a written misbehavior report may serve as some evidence of guilt, such is the case where the misbehavior report charges the plaintiff for behavior that the author of the misbehavior report personally witnessed. *Creech v. Schoellkopf*, 688 F.Supp.2d 205, 214 (W.D.N.Y.2010) (citations omitted) (misbehavior report drafted by officer who personally observed plaintiff possess and transfer pieces of sharpened metal to another inmate constituted some evidence of guilt). In this case, where a determination of guilt would appear to turn on knowledge of the ownership of the documents and an understanding of the circumstances under which the papers were drafted, a misbehavior report which merely states that papers appearing to be legal work signed by other inmates were found in McAllister’s property, it does not establish a per se violation of rules 113.15 and 180.17. See *Hayes v. Coughlin*, No. 87 CIV. 7401, 1996 WL 453071, at *3 (S.D.N.Y. Aug. 12, 1996) (“if a misbehavior report can serve as ‘some evidence’ for a hearing decision and thereby insulate a hearing from review, there would be little point in having a hearing”); see also *Williams v. Dubray*, No. 09-CV-1298, 2011 WL 3236681, at *4 (N.D.N.Y. July 13, 2011) (holding that there were questions of fact whether the determination was based upon some evidence of guilt where the hearing officer relied on misbehavior report that was based on a corrections officer’s unsupported accounts, without additional evidence to support its charges). Thus, absent additional evidence that these papers belonged to other inmates or that McAllister drafted the documents for other inmates’ use, the fact that the misbehavior report identified these documents as being found in McAllister’s secured property does not constitute reliable evidence of guilt.

Finally, McAllister’s testimony does not constitute reliable evidence of guilt. In response to the charge of violating rule 113.15, McAllister testified that the affidavits were his property because he drafted them solely as evidence in his personal litigation against the Department of Probation.

Similarly, in defense of the charge for violating rule 180.17, McAllister repeatedly testified that he did not provide legal assistance to the inmates in question because the affidavits were written solely to serve as supporting evidence in his personal action, the inmates were aware that they would receive no legal benefit as a result, and he did not receive any compensation from the inmates. Regardless whether Call considered McAllister’s testimony to be credible, without some other reliable evidence, such as, perhaps, a statement from one of the other inmates claiming that he signed the affidavit under the belief that McAllister would provide him with legal assistance, McAllister’s testimony denying violations of the charged prison rules would not constitute some evidence of guilt.

*16 Accordingly, it is recommended that Call’s motion for summary judgment be denied as to McAllister’s procedural due process claim.

c. Directive 4913

McAllister further argues that, as a result of the SHU placement, he suffered an unconstitutional deprivation of his legal and personal property because he was required to comply with the limits set forth in directive 4913. This Court has already ruled upon this claim when it was raised at earlier stages. In deciding Call’s motion for summary judgment on the McAllister’s first complaint, this Court held that the directive did not violate his Fourteenth Amendment rights:

Directive # 4913 was reasonably related to valid institutional goals given DOCCS’ responsibility to provide for the health and safety of its staff and inmates and the alternatives provided to inmates in being able to seek exceptions and choose which four or five draft bags of material would remain with them. Moreover, the rules were neutral and reasonably related to the ultimate goals of the facility, security and safety.

McAllister v. Fischer, 2012 WL 7681635, at *12 (N.D.N.Y. July 6, 2012) (Dkt. No. 55, at 22–23), Report and Recommendation adopted by 2013 WL 954961 (N.D.N.Y.

Mar. 12, 2013) (Dkt. No. 58), *appeal dismissed* 2d Cir. 13–111 (Jan. 13.2014). Further, the Court concluded that directive 4913 “did not violate[] McAllister’s Fourteen Amendment rights” and was “reasonably related to valid institutional goals.” Dkt. No. 55, at 23–24; Dkt. No. 58. Thus, any such claim is barred by the law of the case.  *Arizona v. California*, 460 U.S. 605, 618 (1983) (citations omitted); see also *United States v. Thorn*, 446 F.3d 378, 383 (2d Cir.2006) (internal quotation marks and citations omitted) (“The law of the case doctrine counsels against revisiting our prior rulings in subsequent stages of the same case absent cogent and compelling reasons”));  *Arizona*, 460 U.S. at 618 (citations omitted); *Wright v. Cayan*, 817 F.2d 999, 1002 n. 3 (2d Cir.1987) (citations omitted) (“Even when cases are reassigned to a different judge, the law of the case dictates a general practice of refusing to reopen what has been decided.”).

Accordingly, it is recommended that defendant's motion for summary judgment be granted on this ground.

2. Equal Protection

McAllister's only reference to an equal protection violation in the amended complaint is his conclusory claim that Call's reference to a confidential witness during the Tier III hearing was in violation of his right to equal protection. Am. Compl. ¶ 31. Further, in this Court's previous order, McAllister's equal protection claim was dismissed for failure to demonstrate, among other things, that he was part of a protected class or that he was treated differently from any similarly-situated inmates. Dkt. No. 58, at 4; Dkt. No. 55, at 24–25. Thus, any such claim would also be barred by the law of the case. *Thorn*, 446 F.3d at 383. Regardless, McAllister's equal protection claim must also fail for the reasons discussed *infra*.

*17 To establish an equal protection violation, a plaintiff must show that “he was treated differently than others similarly situated as the result of intentional or purposeful discrimination.”  *Phillips v. Girdich*, 408 F.3d 124, 129 (2d Cir.2005). McAllister has not identified, nor does the record disclose, any basis for a reasonable fact-finder to conclude that he was treated differently from similarly-situated individuals. Rather, plaintiffs only support for his equal protection claim is the following:

Call, throughout the entire disciplinary hearing deprive [sic] plaintiff equal protection when he stated: “This is hearing officer Call, this is 2:21 as I was going through my paperwork I realized something that I wanted to point out to Mr. McAllister.”

Defendant Call discriminated against plaintiff when he stated: “I reviewed it this morning the 22nd when it was received again is confidential”

Am. Compl. ¶¶ 31–32. McAllister does not explain how these statements denied him equal protection. McAllister fails to plausibly suggest that he was treated differently from any similarly-situated individuals. Further, even if these statements demonstrate the existence of questions of fact regarding whether McAllister was treated differently from similarly-situated persons, he fails to identify disparity in the conditions “as a result of any purposeful discrimination directed at an identifiable suspect class.” See  *Dolberry v. Jakob*, No. 11–CV–1018, 2014 WL 1292225, at *12 (N.D.N.Y. Mar. 28, 2014).

Accordingly, it is recommended that defendant's motion on this ground should be granted.

G. Qualified Immunity

Call contends that, even if McAllister's claims are substantiated, he is entitled to qualified immunity. The doctrine of qualified immunity is an affirmative defense which “shield[s] an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law.”  *Pearson v. Callahan*, 555 U.S. 223, 244 (2009). Even if a disciplinary disposition is not supported by “some evidence,” prison officials are entitled to qualified immunity if “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”  *Luna*, 356 F.3d at 490 (quoting  *Wilson v. Layne*, 526 U.S. 603, 614 (1999)) (internal quotation marks omitted). This assessment is made “in light of the legal rules that were clearly established at the time it was taken.”  *Wilson*, 526 U.S. at 614;  *Kaminsky v. Rosenblum*, 929 F.2d 922, 925 (2d Cir.1991). To determine whether a state official is entitled to qualified immunity for acts taken during the course of his or her employment, a reviewing court is to determine: “(1) whether plaintiff has

shown facts making out violation of a constitutional right; (2) if so, whether that right was clearly established; and (3) even if the right was clearly established, whether it was objectively reasonable for the [official] to believe the conduct at issue was lawful.” *Phillips v. Wright*, 553 Fed. Appx. 16, 17 (2d Cir.2014) (citing  *Gonzalez v. City of Schenectady*, 728 F.3d 149, 154 (2d Cir.2013)).

*18 First, as discussed, McAllister presented a viable due process claim that the determination was not based on some evidence of guilt because Call (1) relied on confidential witness testimony without making an independent assessment of the witness's credibility and (2) did not otherwise have sufficient reliable evidence to support his finding of guilt. McAllister has also raised issues of fact whether the remaining evidence relied upon—the misbehavior report, McAllister's testimony and statements, and the confiscated legal papers—provided reliable evidence of guilt.

Addressing the second prong of the analysis, there is a clearly-established right to procedural due process protections, including the right to have a disciplinary determination be based on some evidence of guilt. There is also a clearly-established right to an independent assessment of confidential witnesses performed where a hearing officer relies on the witness's testimony ( *Vasquez v. Coughlin*, 726 F.Supp. 466, 472 (S.D.N.Y.1989) (right clearly established by 1986);

see also  *Sira*, 380 F.3d at 80). Further, although there is no bright-line for what suffices as “some evidence” in every prison disciplinary proceeding (*Woodard v. Shanley*, 505 Fed. Appx. 55, 57 (2d Cir.2012)), there were questions of fact surrounding the allegedly reliable evidence demonstrating that McAllister was in possession of other inmates' legal documents or that he provided them with unauthorized legal assistance. Cf. *Turner v. Silver*, 104 F.3d 354, at *3 (2d Cir.1996) (some evidence to support determination that the defendant violated rule against unauthorized legal assistance where documentary evidence indicated the plaintiff received payment from other inmates, author of misbehavior report testified regarding an interview with informant who implicated defendant, prison official testified that inmate told her he had been charged for law library services and inmate testified the same). Call both failed to perform an independent assessment of the confidential witness's credibility and provided no explanation for why both the identity of the witness and the substance of his or her testimony could not

be disclosed to McAllister.  *A Sira*, 380 F.3d at 75 (citing  *Ponte*, 471 U.S. at 498).

Thus, given the state of the law regarding the rights to which an inmate is entitled in his disciplinary hearing, it was not objectively reasonable for Call to have believed that (1) he need not perform an independent assessment of the witness credibility or (2) the misbehavior report, confiscated affidavits, and McAllister's consistent testimony and statements, without more, sufficiently supported a determination that McAllister violated rules 113.15 and 180.17.

Accordingly, defendant's motion for summary judgment should be denied on this ground.

IV. Conclusion

For the reasons stated above, it is hereby **RECOMMENDED** that defendant's motion for summary judgment (Dkt. No. 74) be

*19 1. **GRANTED** insofar as:

- a. dismissing plaintiff's First Amendment claims;
- b. dismissing plaintiff's Eighth Amendment claims;
- c. dismissing plaintiff's challenge to the constitutionality of Directive 4913;
- d. defendant's Eleventh Amendment immunity defense;

2. **DENIED** as to:

- a. plaintiff's Fourteenth Amendment procedural due process claims;
- b. defendant's qualified immunity defense.

Pursuant to  28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court “within fourteen (14) days after being served with a copy of the ... recommendation.” N.Y.N.D.L.R. 72 .1(c) (citing  28 U.S.C. § 636(b)(1)(B)-(C)).

FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE

REVIEW. *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir.1993); *Small v. Sec'y of HHS*, 892 F.2d 15 (2d Cir.1989); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72, 6(a), 6(e).

Dated: October 9, 2014.

All Citations

Not Reported in F.Supp.3d, 2014 WL 5475293

Footnotes

- ¹ This matter was referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636(b) and N.D.N.Y.L.R. 72.3(c).
- ² McAllister is no longer incarcerated and is currently under the supervision of DOCCS.
- ³ SHUs exist in all maximum and certain medium security facilities. The units "consist of single-occupancy cells grouped so as to provide separation from the general population" *N.Y. COMP.CODES R. & REGS. tit 7, § 300.2(b)* (1999). Inmates are confined in a SHU as discipline, pending resolution of misconduct charges, for administrative or security reasons, or in other circumstances as required. *Id.* at pt. 301.
- ⁴ Rule 113.15 provides that "[a]n inmate shall not purchase, sell, loan, give or exchange a personally owned article without authorization." *7 NYCRR 270.2*.
- ⁵ Rule 180.17 provides that "[a]n inmate may not provide legal assistance to another inmate without prior approval of the superintendent or designee. An inmate shall not receive any form of compensation for providing legal assistance." *7 NYCRR 270.2*.
- ⁶ All unpublished decisions referenced herein are appended to this report and recommendation.
- ⁷ Various courts in the Second Circuit have postulated how, if at all, the Iqbal decision affected the five Colon factors which were traditionally used to determine personal involvement. *Pearce v. Estate of Longo*, 766 F.Supp.2d 367, 376 (N.D.N.Y.2011), *rev'd in part on other grounds sub nom.*, *Pearce v. Labelle*, 473 F. App'x 16 (2d Cir.2012) (recognizing that several district courts in the Second Circuit have debated Iqbal's impact on the five Colon factors); *Kleehammer v. Monroe Cnty.*, 743 F.Supp.2d 175 (W.D.N.Y.2010) (holding that "[o]nly the first and part of the third Colon categories pass Iqbal's muster"); *D'Olimpio v. Crisafi*, 718 F.Supp.2d 340, 347 (S.D.N.Y.2010) (disagreeing that Iqbal eliminated Colon's personal involvement standard).

2013 WL 5437617

Only the Westlaw citation is currently available.

United States District Court,
N.D. New York.

David DOUGLAS, Sr., Plaintiff,
v.

PERRARA, Corrr. Officer, Great Meadow C.F.; Lawrence, Corr. Officer, Great Meadow C.F.; Whittier, Corr. Officer, Great Meadow C.F.; Mulligan, Corr. Officer, Great Meadow C.F.; Deluca, Corr. Sergeant, Great Meadow C.F.; and Russel, Deputy Superintendent, Great Meadow C.F., Defendants.

No. 9:11-CV-1353 (GTS/RFT).

|
Sept. 27, 2013.

Attorneys and Law Firms

David Douglas, Sr., Liverpool, NY, pro se.

Hon. [Eric T. Schneiderman](#), Attorney General for the State of New York, [Colleen D. Galligan, Esq.](#), Assistant Attorney General, of Counsel, Albany, NY, for Defendants.

DECISION and ORDER

[GLENN T. SUDDABY](#), District Judge.

*1 Currently before the Court, in this *pro se* civil rights action filed by David Douglas, Sr., ("Plaintiff") against the six above-captioned New York State correctional employees, are the following: (1) Defendants' motion for partial summary judgment (requesting the dismissal of Plaintiff's claims against Defendant Russell, and his claims against the remaining Defendants in their official capacities); and (2) United States Magistrate Judge Randolph F. Treece's Report–Recommendation recommending that Defendants' motion be granted. (Dkt.Nos.70, 80.) Neither party filed an objection to the Report–Recommendation, and the deadline by which to do so has expired. (*See generally* Docket Sheet.) After carefully reviewing the relevant filings in this action, the Court can find no clear error in the Report–Recommendation: Magistrate Judge Treece employed the proper standards, accurately recited the facts, and reasonably applied the law to those facts. As a result, the Court accepts and adopts the

Report–Recommendation for the reasons stated therein. (Dkt. No. 80.)

ACCORDINGLY, it is

ORDERED that Magistrate Judge Treece's Report–Recommendation (Dkt. No. 80) is **ACCEPTED** and **ADOPTED** in its entirety; and it is further

ORDERED that Defendants' motion for partial summary judgment (Dkt. No. 70) is **GRANTED**; and it is further

ORDERED that the following claims are **DISMISSED** from this action: (a) all claims asserted against Defendant Russell, and (b) all claims asserted against Defendants in their official capacities only. The Clerk is directed to terminate Defendant Russell from this action; and it is further

ORDERED that the following claims **REMAIN PENDING** in this action: (a) Plaintiff's claim that Defendants Whittier, Mulligan, Perrara and/or Lawrence subjected him to inadequate prison conditions by depriving him of meals for approximately five consecutive days in December 2009, in violation of the Eighth Amendment; (b) Plaintiff's claim that Defendants Whittier, Mulligan, Perrara and Lawrence used excessive force against him, and that Defendant Deluca failed to protect him from the use of that excessive force, in violation of the Eighth Amendment and New York State common law; and (c) Plaintiff's claim that Defendant Deluca was deliberately indifferent to Plaintiff's serious medical needs (following the assaults) in violation of the Eighth Amendment; and it is further

ORDERED that Pro Bono Counsel be appointed for the Plaintiff for purposes of trial only; any appeal shall remain the responsibility of the plaintiff alone unless a motion for appointment of counsel for an appeal is granted; and it is further

ORDERED that upon assignment of Pro Bono Counsel, a final pretrial conference with counsel will be scheduled in this action before the undersigned, at which time the Court will schedule a jury trial for Plaintiff's remaining claims as set forth above against Defendants Whittier, Mulligan, Perrara, Lawrence and DeLuca. Counsel are directed to appear at the final pretrial conference with settlement authority from the parties.

REPORT–RECOMMENDATION and ORDER

RANDOLPH F. TREECE, United States Magistrate Judge.

*2 *Pro se* Plaintiff David Douglas brought a civil rights Complaint, pursuant to 42 U.S.C. § 1983, asserting that Defendants violated his constitutional rights while he was in the custody of the New York State Department of Corrections and Community Supervision (“DOCCS”) and housed in the Great Meadow Correctional Facility. Specifically, Plaintiff alleges that in early December 2009, he wrote a letter to Defendant Eileen Russell¹ complaining that he had been denied meals for several days. *See* Dkt. No. 1, Compl. at ¶¶ 8, 64, & 66. Plaintiff further alleges that the remaining Defendants violated his constitutional rights when they used excessive force against him on several occasions and denied him medical care in order to treat the injuries he sustained therewith. *See generally id.* And, according to Plaintiff, Defendant Russell’s failure to take disciplinary action against these individuals and curtail their “known pattern of physical abuse of inmates” renders her liable for violating his constitutional rights. *Id.* at ¶ 66.

Presently pending is Defendants’ Motion for Partial Summary Judgment whereby they seek dismissal of Defendant Russell from this action as well as dismissal of all claims against the remaining Defendants in their official capacities. Dkt. No. 70. A response to that Motion was due on February 22, 2013. To date, the Court has not received a response from Plaintiff.

I. DISCUSSION

A. Standard of Review

Pursuant to **FED. R. CIV. P. 56(a)**, summary judgment is appropriate only where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” The moving party bears the burden to demonstrate through “pleadings, depositions, answers to interrogatories, and admissions on file, together with [] affidavits, if any,” that there is no genuine issue of material fact. *F.D.I. C. v. Giannetti*, 34 F.3d 51, 54 (2d Cir.1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). “When a party has moved for summary judgment on the basis of asserted facts supported as required by [Federal Rule of Civil Procedure

56(e)] and has, in accordance with local court rules, served a concise statement of the material facts as to which it contends there exist no genuine issues to be tried, those facts will be deemed admitted unless properly controverted by the nonmoving party.” *Glazer v. Formica Corp.*, 964 F.2d 149, 154 (2d Cir.1992).

To defeat a motion for summary judgment, the non-movant must set out specific facts showing that there is a genuine issue for trial, and cannot rest merely on allegations or denials of the facts submitted by the movant. **FED. R. CIV. P. 56(c); see also** *Scott v. Coughlin*, 344 F.3d 282, 287 (2d Cir.2003) (“Conclusory allegations or denials are ordinarily not sufficient to defeat a motion for summary judgment when the moving party has set out a documentary case.”);

Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 525–26 (2d Cir.1994). To that end, sworn statements are “more than mere conclusory allegations subject to disregard … they are specific and detailed allegations of fact, made under penalty of perjury, and should be treated as evidence in deciding a summary judgment motion” and the credibility of such statements is better left to a trier of fact. *Scott v. Coughlin*, 344 F.3d at 289 (citing *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir.1983) and *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir.1995)).

*3 When considering a motion for summary judgment, the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-movant. *Nora Beverages, Inc. v. Perrier Group of Am., Inc.*, 164 F.3d 736, 742 (2d Cir.1998). “[T]he trial court’s task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution.” *Gallo v. Prudential Residential Servs., Ltd. P’ship*, 22 F.3d 1219, 1224 (2d Cir.1994). Furthermore, where a party is proceeding *pro se*, the court must “read [his or her] supporting papers liberally, and … interpret them to raise the strongest arguments that they suggest.” *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994), accord, *Soto v. Walker*, 44 F.3d 169, 173 (2d Cir.1995). Nonetheless, mere conclusory allegations, unsupported by the record, are insufficient to defeat a motion for summary judgment. *See* *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir.1991). Summary judgment

is appropriate “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.”

 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Pursuant to the Local Rules of Practice for the Northern District of New York, “[w]here a properly filed motion is unopposed and the Court determines that the moving party has met its burden to demonstrate entitlement to the relief requested therein, the non-moving party's failure to file to serve any papers ... shall be deemed as consent to the granting or denial of the motion, as the case may be, unless good cause is shown.” N.D.N.Y.L.R. 7.1(b)(3). “The fact that there has been no response to a summary judgment motion does not, of course, mean that the motion is to be granted automatically.”

 *Champion v. Artuz*, 76 F.3d 483, 486 (2d Cir.1996). Even in the absence of a response, Defendants are entitled to summary judgment only if the material facts demonstrate their entitlement to judgment as a matter of law. *Id.*; **FED. R. CIV. P. 56(c)**. Because Plaintiff has failed to raise any question of material fact, the Court will accept the facts as set forth in Defendants' Statement Pursuant to Rule 7.1(a)(3) (Dkt. No. 70-2), supplemented by Plaintiffs' verified Complaint (Dkt. No. 1), as true. See *Lopez v. Reynolds*, 998 F.Supp. 252, 256 (W.D.N.Y.1997).

B. Personal Involvement

As noted above, Plaintiff brings this civil rights action for alleged violations of his constitutional rights during his incarceration in December 2009 at Great Meadow Correctional Facility. Plaintiff claims that in early December 2009, he was subjected to threats and harassment by other inmates and correctional officers. Compl. at ¶ 1. Plaintiff alleges that beginning on December 11, 2009, he was denied several meals for several consecutive days by unnamed individuals, prompting him to file grievances and write two letters to Defendant Russell. *Id.* at ¶¶ 2–8.² Thereafter, on December 16, 2009, Plaintiff's meals were delivered to him and, on the following date, he was moved to protective custody. *Id.* at ¶¶ 9–10. The remainder of Plaintiff's Complaint describes a series of events wherein the remaining Defendants are accused of using excessive physical force against him and denying him medical attention.

*⁴ With regard to the pending, unopposed Motion, the Court notes that there is a paucity of factual allegations

contained in the Complaint concerning Defendant Russell. In fact, the only factual allegation that this Court can point to is that Plaintiff wrote two letters to Defendant Russell complaining about being denied meals. Defendant Russell is not named nor referenced throughout the remainder of the Complaint. Nevertheless, in the section of the Complaint where Plaintiff lists his causes of action, he seemingly seeks to hold Defendant Russell liable for her alleged failure to intervene and take disciplinary action against the Defendants in order to curb their known pattern of physical abuse against inmates. *Id.* at ¶¶ 64 & 66.

According to Defendants' uncontested submissions, Defendant Eileen Russell is employed by DOCCS and worked at Great Meadow in 2006 as the Assistant Deputy Superintendent for Special Housing assigned to the Behavioral Health Unit. Dkt. No. 70-3, Eileen Russell Decl., dated Feb. 4, 2013, at ¶¶ 1, 3, & 4. During her tenure in that position, Plaintiff neither worked nor was housed as a patient in the Behavioral Health Unit. Russell Decl. at ¶ 11. Russell did not have any responsibilities related to delivery of meals to inmates nor does she have any recollection of speaking with Plaintiff or seeing any correspondence from him. *Id.* at ¶ 13. Furthermore, at no time was she made aware of any assault against Plaintiff by any DOCCS employee. *Id.* at ¶ 15.

The Second Circuit has held that “personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under  § 1983.”

 *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir.1994) (citations omitted). Moreover, “the doctrine of *respondeat superior* cannot be applied to  section 1983 actions to satisfy the prerequisite of personal involvement.” *Kinch v. Artuz*, 1997 WL 576038, at *2 (S.D.N.Y. Sept. 15, 1997) (citing  *Colon v. Coughlin*, 58 F.3d 865, 874 (2d Cir.1995) &  *Wright v. Smith*, 21 F.3d at 501) (further citations omitted)). Thus, “a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the constitution.”  *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

It appears that Plaintiff seeks to hold Defendant Russell liable due to her employment as a supervisor at Great Meadow. The Second Circuit has stated that a supervisory defendant may have been personally involved in a constitutional deprivation within the meaning of  § 1983 if she: (1) directly participated in the alleged infraction; (2) after learning of the

violation, failed to remedy the wrong; (3) created a policy or custom under which unconstitutional practices occurred or allowed such policy or custom to continue; (4) was grossly negligent in managing subordinates who caused the unlawful condition or event; or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.³ *Colon v. Coughlin*, 58 F.3d at 873 (citations omitted); *Williams v. Smith*, 781 F.2d 319, 323–24 (2d Cir.1986) (citations omitted).

*5 Here, the evidence shows that Defendant Russell did not directly participate in any constitutional wrongdoing, she was not aware that Plaintiff had been experiencing any problems with other inmates and staff, in her assignment to the Behavioral Health Unit she did not come into contact with the Plaintiff, and, she was not responsible for creating policies or customs nor for rectifying any of the alleged constitutional infirmities Plaintiff is alleged to have been subjected to. Because Plaintiff failed to respond to Defendants' Motion, he has not created any material issue of fact regarding Russell's non-involvement in any constitutional wrongdoing. Thus, based upon the record before the Court, we find that Defendant Russell was not personally involved in any wrongdoing and should be **dismissed** from this action. See *Wright v. Smith*, 21 F.3d at 501 (defendant may not be held liable simply because he holds a high position of authority).

C. Eleventh Amendment

By their Motion, Defendants seek dismissal of claims brought against them in their official capacities. Dkt. No. 70. In making this request, the Defendants note that during the pendency of this action, Plaintiff was released from DOCCS's custody, thereby rendering moot any request he has made for injunctive relief. Dkt. No. 70–4, Defs.' Mem. of Law, at pp. 7–8. After reviewing the Complaint, the Court notes that Plaintiff primarily seeks monetary compensation for both compensatory and punitive damages. See Compl. at Relief Requested. In addition, he seeks a declaratory judgment that his rights have been violated, but does not seek other injunctive relief. *Id.*

The Eleventh Amendment states, “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens

or Subjects of any Foreign State.” U.S. CONST. amend. XI. Although by its terms, the amendment bars suit by citizens of one state against another state, the Supreme Court has held that such amendment similarly bars suits against a state by its own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890). “The Eleventh Amendment thus ‘affirm[s] that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.’” *Richardson v. New York State Dep't of Corr. Servs.*, 180 F.3d 426, 447–48 (2d Cir.1999) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984)). Thus, sovereign immunity provided for in the Eleventh Amendment prohibits suits against the state, including a state agency in federal court. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. at 98–101; *Severino v. Negron*, 996 F.2d 1439, 1441 (2d Cir.1993); *Daisernia v. State of New York*, 582 F.Supp. 792, 796 (N.D.N.Y.1984). To the extent a state official is sued for damages in his or her official capacity, “such a suit is deemed to be a suit against the state, and the official is entitled to invoke the eleventh amendment immunity belonging to the state.” *Rourke v. New York State Dep't. of Corr. Servs.*, 915 F.Supp. 525, 539 (N.D.N.Y.1995) (citing *Berman Enters., Inc. v. Jorling*, 3 F.3d 602, 606 (2d Cir.), cert. denied, 510 U.S. 1073 (1994); *Ying Jing Gan v. City of New York*, 996 F.2d 522, 529 (2d Cir.1993)); see also *Mathie v. Fries*, 121 F.3d 808, 818 (2d Cir.1997) (“A claim against a government officer in his official capacity is, and should be treated as, a claim against the entity that employs the officer”).

*6 However, whether state officials sued in their official capacities are entitled to Eleventh Amendment immunity depends also upon the relief sought in the complaint. The Second Circuit has held that in accordance with *Ex parte Young*, 209 U.S. 123 (1908), “acts of state officials that violate federal constitutional rights are deemed not to be acts of the state and may be subject of injunctive or declaratory relief in federal court.” *Berman Enters., Inc. v. Jorling*, 3 F.3d at 606 (citations omitted); see also *Rourke v. New York State Dep't of Corr. Servs.*, 915 F.Supp. at 540. While much of the relief sought herein is compensatory and punitive monetary relief, to the extent Plaintiff seeks some form of declaratory relief, such claims against the Defendants in their official capacities could go forward insofar as the Plaintiff seeks prospective relief. However, in light of his release from DOCCS's custody, the Court finds that any request for

prospective injunctive relief is moot and the claims against the remaining Defendants in their official capacities should be dismissed. *Khalil v. Laird*, 353 F. App'x 620 (2d Cir.2009) (citing *Muhammad v. City of New York Dep't of Corr.*, 126 F.3d 119, 123 (2d Cir.1997)).

II. CONCLUSION

For the reasons stated herein, it is hereby

RECOMMENDED, that Defendants' Motion for Partial Summary Judgment (Dkt. No. 70) be **GRANTED** and all claims against Defendant Russell be **DISMISSED** and claims against the remaining Defendants in their official capacities be **DISMISSED**; and it is further

RECOMMENDED, that if the above recommendations are accepted, this case be set down for a final pre-trial conference with the parties to assess whether this matter is trial ready; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Report–Recommendation and Order upon the parties to this action.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN (14) DAYS WILL PRECLUDE APPELLATE REVIEW** *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15 (2d Cir.1989)); see also 28 U.S.C. § 636(b) (1); FED. R. CIV. P. 72 & 6(a).

All Citations

Not Reported in F.Supp.2d, 2013 WL 5437617

Footnotes

- 1 Although Plaintiff spells this Defendant's name as "Russel," it is clear from Defendants' submissions that the correct spelling of this individual's name is "Russell" and the Court will refer to her accordingly. Compl. at ¶ 8; Dkt. Nos. 10 & 70–3.
- 2 Plaintiff alleges that in addition to filing several grievances he submitted sick call requests and sent letters to the Inspector General, all explaining how his Eighth Amendment rights were being violated. Compl. at ¶¶ 5–8.
- 3 The Second Circuit has yet to address the impact of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), upon the categories of supervisory liability under *Colon v. Coughlin*, 58 F.3d 865 (2d Cir.1995). See *Grullon v. City of New Haven*, 720 F.3d 133 (2d Cir.2013) (noting that the Court's decision in *Iqbal* "may have heightened the requirements for showing a supervisor's personal involvement," but declining to resolve the issue). Lower courts have struggled with this issue, specifically whether *Iqbal* effectively calls into question certain prongs of the *Colon* five-part test for supervisory liability. See, e.g., *Sash v. United States*, 674 F.Supp.2d 531, 543 (S.D.N.Y.2009). While some courts have taken the position that only the first and third of the five *Colon* categories remain viable and can support a finding of supervisory liability, see, e.g., *Bellamy v. Mount Vernon Hosp.*, 2009 WL1835939, at *6 (S.D.N.Y. June 26, 2009), aff'd, 387 F. App'x 55 (2d Cir.2010), others disagree and conclude that whether any of the five categories apply in any particular cases depends upon the particular violations alleged and the supervisor's participatory role, see, e.g., *D'Olimpio v. Crisafi*, 718 F.Supp.2d 340, 347 (S.D.N.Y.2010). Nevertheless, this Court, until instructed to the contrary, continues to apply the entirety of the five-factor *Colon* test.

2013 WL 838284

Only the Westlaw citation is currently available.

United States District Court,
N.D. New York.

William HALL, Plaintiff,

v.

COUNTY OF SARATOGA, John Doe, Individually and in his capacity as an Employee of the County of Saratoga, New York, Sheriff's Department and the Saratoga County Sheriff, Lt. Corbet, Jane Doe, the persons intended being all Civilian personnel as employees or under Contract as independent medical personnel, Defendants.

No. 1:10-CV-1120 (NAM/CFH).

|
March 6, 2013.

Attorneys and Law Firms

Grasso, Rodriguez & Grasso, [Nicholas J. Grasso, Esq.](#), of Counsel, Schenectady, NY, for Plaintiff.

Bailey Kelleher & Johnson, P.C., Nannette R. Kelleher, Esq., of Counsel, Albany, NY, for Defendants.

MEMORANDUM-DECISION and ORDER

[NORMAN A. MORDUE](#), District Judge.

I. INTRODUCTION

*1 This action arises under the auspices of [42 U.S.C. § 1983](#). Plaintiff asserts that while he was an inmate at the Saratoga County Correctional Facility (“SCCF”), defendants denied him adequate medical care, committed a battery upon him and are liable in negligence for personal injuries he sustained while in their custody. Defendants have moved for summary judgment dismissing the complaint. Plaintiff has not submitted papers in opposition to this motion.¹

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate when there is no genuine issue with regard to any material fact, and the moving party

is entitled to judgment as a matter of law. See [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322 (1986). Stated otherwise, summary judgment is appropriate “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party [.]” [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 587 (1986). When deciding a summary judgment motion, the Court must “resolve all ambiguities and draw all factual inferences in favor of the party opposing the motion.” [McPherson v. Coombe](#), 174 F.3d 276, 280 (2d Cir.1999).

When, as here, a summary judgment motion is unopposed, “[t]he fact that there has been no [such] response ... does not ... [by itself] mean that the motion is to be granted automatically.” [Champion v. Artuz](#), 76 F.3d 483, 486 (2d Cir.1996); see also [Vt. Teddy Bear Co. v. I-800 Beargram Co., Inc.](#), 373 F.3d 241, 244 (2d Cir.2004). Instead, a court must (1) determine what material facts, if any, are disputed in the record presented on the motion; and (2) assure itself that, based on those undisputed material facts, the law indeed warrants judgment for the moving party. See [Champion](#), 76 F.3d at 486. The motion may fail if the movant's submission fails to establish that no material issue of fact remains for trial, [Amaker v. Foley](#), 274 F.3d 677, 681 (2d Cir.2001), or if the “undisputed facts fail to show that the moving party is entitled to judgment as a matter of law,” [Vt. Teddy Bear](#), 373 F.3d at 244 (internal citation and quotation marks omitted).

B. Exhaustion of Administrative Remedies

The Prisoner Litigation Reform Act of 1995 (“PLRA”), mandates exhaustion by prisoners of all administrative remedies before bringing an action regarding prison conditions of confinement. See [42 U.S.C. § 1997e\(a\)](#). Specifically, the PLRA provides that “[n]o action shall be brought with respect to prison conditions under [section 1983](#) of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” *Id.* The Supreme Court has held that the PLRA’s “exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” [Porter v. Nussle](#), 534 U.S. 516, 532 (2002).

*2 “‘Conditions of confinement’ is not a term of art; it has a plain meaning.”  *Jenkins v. Haubert*, 179 F.3d 19, 28 (2d Cir.1999). “It quite simply encompasses all conditions under which a prisoner is confined for his term of imprisonment.” *Id.* These include terms of disciplinary or administrative segregation such as keeplock or solitary confinement, as well as more general conditions affecting a prisoner’s quality of life such as ... the deprivation of exercise, medical care, adequate food and shelter, and other conditions that, if improperly imposed, could violate the Constitution. *Id.* (citing  *Figueroa v. Rivera*, 147 F.3d 77, 82 (1st Cir.1998);  *Channer v. Mitchell*, 43 F.3d 786, 788 (2d Cir.1994) (*per curiam*)). In short, any deprivation that does not affect the fact or duration of a prisoner’s overall confinement is necessarily a condition of that confinement.

In  *Hemphill v. New York*, 380 F.3d 680 (2d Cir.2004), the Second Circuit “read together,”  *Macias v. Zenk*, 495 F.3d 37, 41 (2d Cir.2007), a number of decisions and consolidated cases and formulated a three-part test for examining the scope of the PLRA’s exhaustion requirement:

Depending on the inmate’s explanation for the alleged failure to exhaust, the court must ask whether administrative remedies were in fact available to the prisoner. The court should also inquire as to whether the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it, or whether the defendants’ own actions inhibiting the inmate’s exhaustion of remedies may estop one or more of the defendants from raising the plaintiff’s failure to exhaust as a defense. If the court finds that administrative remedies were available to the plaintiff, and that the defendants are not estopped and have not forfeited their non-exhaustion defense, but that the plaintiff nevertheless did not exhaust available remedies, the court should consider whether special circumstances have been plausibly

alleged that justify the prisoner’s failure to comply with administrative procedural requirements.

 *Hemphill*, 380 F.3d at 686.

New York State law provides a three tier inmate grievance procedure applicable to plaintiff’s claims. See,  N.Y. Correct. Law § 139; N.Y. Comp. Codes R. & Regs. tit. 7, § 701.1 *et seq.* (2003). Courts in the this Circuit have long recognized this procedure as an “available” remedy for purposes of the PLRA. See *Mingues v. Nelson*, No. 96-CV-5396, 2004 WL 324898, at *4 (S.D.N.Y. Feb. 20, 2004) (citing *Mojias v. Johnson*, 351 F.3d 606 (2d Cir.2003) and

 *Snider v. Melindez*, 199 F.3d 108, 112–13 (2d Cir.1999)). Richard Emery, the Chief Administrator with the rank of Colonel for SCCF submitted an affidavit wherein he averred that the facility maintained an inmate grievance program established by the New York State Department of Corrections and Community Supervision (“DOCCS”) pursuant to the above-referenced law and regulations. Further, Emery stated that the grievance program is enumerated in the policies and procedures of SCCF and is distributed to each inmate in an Inmate Handbook. Review of the complaint and the entire record for that matter reveals no suggestion that plaintiff filed or attempted to pursue a grievance of his claims administratively at SCCF prior to filing the instant action.

*3 Regarding part two of the *Hemphill* analysis, plaintiff does not allege in the complaint or anywhere in the record that defendants inhibited his ability to utilize the grievance program which was indisputably available to him at SCCF. Finally, review of the record does not reveal any “special circumstances” which would justify plaintiff’s failure to comply with administrative requirements prior to filing the present federal claim. See  *Hemphill*, 380 F.3d at 686. Thus, the Court finds there is no genuine issue of material fact concerning plaintiff’s failure to have exhausted administrative remedies prior to commencing his  § 1983 claims against defendants. Based thereupon, these federal claims are subject to dismissal on procedural grounds.

C. Plaintiff’s Claims Under 42 U.S.C. § 1983

1. Inadequate Medical Treatment

Even if the Court ignored plaintiff's procedural failings, his § 1983 claims fare no better on their merits. According to the complaint and his response to interrogatories filed in this matter, plaintiff claims that defendants violated the Eighth Amendment when failed to provide adequate medical care to him while he was an inmate at SCCF by: 1) failing to comply with care and treatment consistent with the diagnosis of renal failure; 2) failing to address the plugging of an A.V. fistula in his left arm in a timely fashion despite his complaints about it, putting a shunt in his neck; 3) not allowing him to shower or bathe for eight days which led to a septic infection; and 4) failing to follow a special diet of low calcium, phosphorous and potassium which was recommended by plaintiff's physician, Dr. Daoui and the Rubin Dialysis Center.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments" on those convicted of crimes, which includes punishments that "involve the unnecessary and wanton infliction of pain."  *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (citations omitted). The Eighth Amendment also applies to prison officials when they provide medical care to inmates. See  *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). To establish an unconstitutional denial of medical care, a prisoner must prove "deliberate indifference to [his] serious medical needs."  *Id.* at 104.

The deliberate indifference standard embodies both an objective and a subjective prong. First, the alleged deprivation must be, in objective terms, "sufficiently serious."  *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). See *Nance v. Kelly*, 912 F.2d 605, 607 (2d Cir.1990) (Pratt, J., dissenting) (standard contemplates "a condition of urgency, one that may produce death, degeneration, or extreme pain") (citations omitted). Second, the charged official must act with a sufficiently culpable state of mind. See  *Wilson*, 501 U.S. at 298. Deliberate indifference requires more than negligence, but less than conduct undertaken for the very purpose of causing harm. See  *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). More specifically, a prison official does not act in a deliberately indifferent manner unless that official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."  *Id.* at 837.

*4 "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."  *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Nevertheless, a pattern of omissions may permit the inference of deliberate unconcern for the prisoner, and gross negligence by prison employees creates a strong presumption of deliberate indifference.  *Doe v. New York City Department of Soc. Servs.*, 649 F.2d 134, 143–44, 145 (2d Cir.1981), cert. denied, 464 U.S. 864 (1983);  *Langley v. Coughlin*, 715 F.Supp. 522, 537 (S.D.N.Y.1989). Furthermore, a health provider cannot claim to have exercised his or her "best judgment" where that judgment is based on a cursory examination or inadequate diagnostic procedures. *Williams v. United States*, 747 F.Supp. 967, 1009 (S.D.N.Y.1990). Finally, prison officials cannot defend practices that fall below the norm of what is generally accepted in the medical community merely on the ground that such practices are common throughout the correctional system. See  *Todaro v. Ward*, 565 F.2d 48, 53 (2d Cir.1977).

Stephen Strader, the Medical Director at SCCF, who oversees all medical personnel at SCCF and participates in the care and treatment of all inmates at the facility, submitted an affidavit detailing the medical care provided to plaintiff during the relevant time period. According to Dr. Strader, plaintiff entered the facility on December 1, 2008, on a driving while intoxicated charge. Thus, he was automatically subject to monitoring for ETOH withdrawal. An Inmate Physical Assessment Form completed at the time of his arrival indicated that plaintiff was being treated for Stage IV Renal Disease. Dr. Strader explained that chronic renal disease is the gradual loss of kidney function which can occur over months or years. According to Dr. Strader, Stage IV is considered the most severe stage of the disease; it is usually irreversible and will often progress to complete kidney failure. At that point, Dr. Strader explained, the kidneys can no longer adequately filter waste and excess fluids from the body and dangerous levels of fluids, electrolytes and wastes can accumulate. Dr. Strader stated that the only option available to patients at this stage of kidney disease is dialysis or renal transplant.

Dr. Strader noted that when an inmate enters SCCF with a chronic disease such as plaintiff's, the facility obtains the inmate's medical records when possible and facilitates continuing treatment by local specialists in accordance with security policies. According to Dr. Strader, inmates are transferred to all outside medical provider appointments by the Saratoga County Sheriff's Department road patrol unless emergency ambulatory services are required. Dr. Strader

averred that review of plaintiff's medical records confirmed the diagnosis of Stage IV chronic kidney disease or [renal failure](#) and a medical evaluation by plaintiff's nephrologist prior to his incarceration evidenced worsening [renal failure](#). Dr. Strader noted that when plaintiff entered SCCF, he had an [A.V. fistula](#) already in place. Dr. Strader explained that an [A.V. fistula](#) is essentially an artificial vein that connects directly to an artery. Dr. Strader stated that [A.V. fistulas](#) are commonly created surgically to be used for dialysis treatments. According to Dr. Strader, plaintiff's [A.V. fistula](#) was inserted in 2007 due to his progressing [kidney disease](#) and anticipation that dialysis would be necessary in the future.

*5 Within the first few days of plaintiff's incarceration, SCCF contacted plaintiff's nephrologist, Dr. Daoui to determine when he would have to be seen and what treatment was necessary. According to Dr. Strader, Dr. Daoui advised that plaintiff would need monthly blood work to monitor his kidney function and electrolyte levels. Dr. Daoui asked that the results of the bloodwork be faxed to his office for review. Plaintiff saw Dr. Daoui for evaluation on January 9, 2009. Dr. Strader averred that in the course of his duties as the facility physician, he reviewed Dr. Daoui's notes and recommendations following each visit. Dr. Strader also stated that while it was his practice to defer to specialist recommendations, he maintained final authority over the medical treatment provided to inmates. Dr. Strader stated that his review of the notes from plaintiff's follow-up evaluation with Dr. Daoui on March 9, 2009, revealed worsening kidney function in the months prior to plaintiff's incarceration and Dr. Daoui's observation that plaintiff would likely soon need dialysis.

On May 11, 2009, Dr. Strader averred that Dr. Daoui recommended that plaintiff adhere to a low potassium diet. Dr. Strader understood this recommendation to require that plaintiff avoid eating excess potassium. According to Dr. Strader, limiting one's potassium intake is necessary in advanced stages of [kidney disease](#). This is because when one's kidney's are failing, it leads to the inability to maintain a normal potassium level as the kidneys begin to lose the ability to remove potassium from the blood. Dr. Strader stated that it was likely that the base diet provided to plaintiff at SCCF already contained lower levels of potassium than he would be ingesting outside the facility. Notably, Dr. Strader opined that "when a renal patient is placed on a low potassium diet, it is because his kidneys have already failed thereby leading to the inability to maintain normal potassium levels. A high potassium diet will not cause [kidney failure](#)." Nevertheless,

as Dr. Daoui did not prescribe a specific level of potassium intake for plaintiff, SCCF medical staff advised the kitchen staff to restrict plaintiff's meals so they did not include overly high levels of potassium. Dr. Strader stated that SCCF also continued monitoring plaintiff's metabolic blood panel and electrolytes to gauge whether his kidney functions were worsening and unable to maintain normal potassium levels.

Dr. Strader also stated that in his May 9, 2009, office note, Dr. Daoui recommended that plaintiff start [hemodialysis](#). Indeed, the Court notes that in the May 9, 2009, note, Dr. Daoui changed plaintiff's diagnosis to "'CKD' [or [chronic kidney disease](#)] stage 5." However, on May 17, 2009, days before plaintiff's dialysis was to start, he complained that the [fistula](#) in his left arm had stopped working. Dr. Strader averred that while he was not a nephrologist, he had a medical understanding of how [fistulas](#) are used, complications that can arise with a [fistula](#), and what procedures may be needed to correct those complications. According to Dr. Strader, one complication that can arise is that a [fistula](#) can clot or clog which prevents fluid from passing through it. Dr. Strader's review of plaintiff's medical records revealed that a clot or clog in plaintiff's [A.V. fistula](#) had occurred at least one time before he entered SCCF. Dr. Strader stated that a clogged or clotted [fistula](#) is not a life threatening condition and it is unlikely to cause any pain to a patient. When it occurs, Dr. Strader stated that a nephrologist will examine the [fistula](#) to determine if a surgical revision will need to be performed. If the patient is on dialysis, Dr. Strader stated that a temporary catheter is placed to allow continuing dialysis pending repair of the [fistula](#).

*6 When plaintiff complained that his [fistula](#) had stopped working, a nurse at SCCF contacted Dr. Daoui to see how he would like to proceed as plaintiff was scheduled to begin dialysis. Dr. Daoui recommended that a temporary catheter be placed to allow dialysis to proceed while the [fistula](#) was repaired. Dr. Strader said that he then scheduled a [fistulogram](#), a procedure used to determine whether any fluid can pass through a [fistula](#), for the beginning of June. On May 21, 2009, Dr. Strader stated that plaintiff underwent a procedure at Saratoga Hospital for the insertion of a temporary right internal jugular tunnel [hemodialysis catheter](#). Following this procedure, Dr. Strader averred that Dr. Dempsey at Saratoga Hospital contacted SCCF and expressed concern regarding plaintiff being returned to the general inmate population with the catheter in place. Dr. Dempsey recommended that plaintiff be taken out of the general population to reduce the risk that the catheter would be pulled out which could cause plaintiff

to bleed to death before medical help could arrive. Though plaintiff strenuously objected to the restriction, Dr. Strader stated that plaintiff was separated from the general population and placed on medical watch unit.

Dr. Strader stated that following the catheter insertion on May 21, 2009, showering restrictions were placed on plaintiff because it was deemed medically necessary to keep the catheter site dry. On May 28, 2009, SCCF medical staff were advised by plaintiff's specialists at the Rubin Dialysis Center that he could resume showering and the restriction was lifted. Plaintiff began his dialysis treatments on May 29, 2009, and received a total of 17 dialysis treatments between then and the time of his release from the facility in July 2009.

Dr. Strader opined to a reasonable degree of medical certainty that the treatment plaintiff received at SCCF did not hasten his *kidney disease* and did not cause his *fistula* to become clotted. Rather, according to Dr. Strader, the care and treatment provided to plaintiff at SCCF was in compliance with all accepted standards of care and in compliance with the recommendations of plaintiff's own specialists. Overall, Dr. Strader said that plaintiff's blood pressure and weight were monitored weekly and at times daily during his six month incarceration and blood work was performed once to twice monthly to monitor his kidney function and electrolyte levels. Plaintiff's medical records confirm Dr. Strader's statement that plaintiff was evaluated three times by his nephrologist and was in daily contact with the medical staff at SCCF. Dr. Strader averred:

His medications were constantly monitored, he was placed on a restricted diet [], and relocated to a medical unit to ensure his safety. [Plaintiff's] records evidenced that his kidney was [sic] worsening with each visit to his nephrologist before he entered SCCF. [Plaintiff] received the same care for his *renal disease* while at SCCF that he would have received had he not been incarcerated. I can affirm to a reasonable medical certainty that it was not [plaintiff's] incarceration which resulted in his requiring dialysis, but the natural progression of his disease.

a. Treatment of Plaintiff's *Fistula*

*7 Turning to plaintiff's claims of inadequate medical care, plaintiff alleges that defendants "fail[ed] to address the plugging of the *A.V. fistula* in his left arm in a timely fashion." Plaintiff testified at a 50-h hearing and at his deposition in connection with this matter that defendants waited five to six weeks to treat the clogged *fistula*. Notably, plaintiff did not allege or testify that the clogged *fistula* caused him extreme pain and there is no medical evidence in the record which indicate that the failure to treat plaintiff's condition immediately as he requested would or could have resulted in "death, degeneration or extreme pain." *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir.1994) (quoting *Nance*, 912 F.2d at 607). Based thereupon, defendants are correct when they argue that there is no evidence to support plaintiff's claim that failure to act immediately to remedy his clogged *fistula*, in and of itself, was a deprivation "sufficiently serious" to warrant review under the Eighth Amendment. *Wilson v. Seiter*, 501 U.S. at 298.

Nevertheless, even if a clogged *fistula* is a serious medical condition under the standard described in *Nance, supra*, the record here reveals that defendants' treatment of the problem was reasonable and in accordance with the directives of Dr. Daoui. Plaintiff alleges that SCCF's actions in evaluating the clogged *fistula* took too long and caused him to have a catheter inserted. However, it was Dr. Daoui who recommended insertion of the catheter to ensure plaintiff's dialysis treatments could start as scheduled. Plaintiff believes that he should have had the *fistula* repaired immediately instead of having to undergo placement of the catheter. However, it is well settled that "disagreements over medications, diagnostic techniques (e.g., the need for X-rays), forms of treatment, or the need for specialists or the timing of their intervention, are not adequate grounds for a Section 1983 claim. *Sonds v. St. Barnabas Hosp. Corr. Health Servs.*, 151 F.Supp.2d 303, 312 (S.D.N.Y.2001). "These issues implicate medical judgments and, at worst, negligence amounting to medical malpractice, but not the Eighth Amendment." *Id.* (citing *Estelle v. Gamble*, 429 U.S. at 107

b. Inadequate Diet

The intentional failure to provide an inmate with a medically prescribed diet for a prolonged period of time can state

a viable Eighth Amendment claim. *Abdush—Shahid v. Coughlin*, 933 F.Supp. 168, 180 (N.D.N.Y.1996) (citing  *Robles v. Coughlin*, 725 F.2d 12, 15 (2d Cir.1983) (Eighth Amendment's prohibition against cruel and unusual punishment requires serving inmates nutritionally adequate food prepared and served under conditions that do not present imminent danger to health and well-being of inmates who consume it)). However, the "objective component" of an Eighth Amendment claim requires a plaintiff to show evidence of some adverse health impact caused by the discontinuance of or failure to provide the prescribed diet. *Davidson v. Desai*, 817 F.Supp.2d 166, 190 (W.D.N.Y.2011).

*8 Plaintiff asserts that defendants failed to follow the special diet of low **calcium**, phosphorous and potassium recommended by his doctor and the specialists at the Rubin Dialysis Center. However, there is no evidence in the record that Dr. Daoui ever ordered that plaintiff's intake of **calcium** and phosphorous be limited. Indeed, the only restriction Dr. Daoui placed on plaintiff's diet was "low potassium." The record shows that once, Dr. Daoui placed this restriction on plaintiff's diet, the facility kitchen was made aware of the restriction and plaintiff's diet was altered. Although plaintiff asserts that his diet was not properly altered, defendants are correct when they contend that plaintiff's blood levels were continuously monitored and Dr. Daoui made no changes based on his subsequent review of plaintiff's laboratory results. Thus, there is no evidence that plaintiff received an inadequate diet while incarcerated at SCCF. Moreover, there is no objective evidence that the alleged inadequacy of his diet caused any worsening of his health or renal condition. As referenced above, Dr. Strader opined that high levels of potassium do not cause **kidney failure**. Rather, Dr. Strader noted that plaintiff's inability to maintain normal potassium levels was due to the natural progression of his **kidney disease**.

c. Showering Restriction

Plaintiff asserts that he was not allowed to shower for several days after placement of the catheter for dialysis and that this caused a "septic infection." Regardless of whether restriction of shower privileges for the time period in question rises to level of denial of a serious medical need, there is no evidence in the record that plaintiff ever developed any type of septic infection while incarcerated at SCCF. Indeed, while plaintiff testified at his 50-H hearing that he got a septic infection at the site of the catheter placement and was "in the hospital for four days," the Court finds no record of such a hospital visit or infection his medical records. Moreover, the showering

restriction was implemented at the instruction of plaintiff's specialists at the Rubin Dialysis Center who ordered that the catheter site be kept dry. On the day that medical personnel at SCCF were advised by the Rubin Dialysis Center that plaintiff could resume showering, the restriction was lifted.

d. Overall Treatment of Plaintiff's Renal Disease

Plaintiff contends that the care he received at SCCF resulted in his requiring dialysis and was not in his "best interest." However, as referenced above, plaintiff entered the facility with Stage IV **renal disease** and his medical records demonstrate that his condition was worsening in the months just prior to his incarceration. Plaintiff arrived at SCCF with an **A.V. fistula** because his physician anticipated that he would soon require dialysis. Within three months of entering the facility, Dr. Daoui noted that plaintiff's bloodwork warranted a change in his diet and the initiation of **hemodialysis**. The record fully supports defendants' contention that it was the natural progression of plaintiff's disease, not the care or treatment he received at SCCF, which led to his requiring dialysis. There is nothing in the record which suggests that plaintiff's care and treatment at SCCF was not in accordance with generally accepted medical principles and the advice and recommendation of his own specialists.

*9 Consequently, there are no material questions of fact concerning plaintiff's claims of inadequate medical treatment under the Eighth Amendment and these claims must be dismissed.

2. Excessive Force

Defendants contend that while plaintiff's complaint did allege a claim for deliberate indifference to his medical needs, he did not assert a claim under  42 U.S.C. § 1983 for excessive force. Defendants argue that even if his complaint was deemed to include a claim of excessive force under  § 1983, it would still fail. "The test of whether use of force in prison constitutes excessive force contrary to the Eighth Amendment is whether the force was used in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."  *Scott v. Coughlin*, 344 F.3d 282, 291 (2d Cir.2003) (citing  *Hudson v. McMillian*, 503 U.S. 1, 7 (1992)). "The absence of serious injury is ... relevant to the Eighth Amendment inquiry, but does not end it." *Id.* (quoting  *Hudson*, 503 U.S. at 7.)

In this case, plaintiff's complaint alleges simply that defendant Corbett struck him in the face with a dish, milk and other objects. The complaint does not assert that plaintiff suffered any injury as a result of this incident. In his response to interrogatories, plaintiff asserts further that on May 11, 2009, "Lt. Corbett committed an assault on [him] by intentionally smashing a plate of food against the edge of a table and hitting [plaintiff] in the face with it and then throwing a glass of milk in his face causing [plaintiff] reasonable apprehension of the immediate harmful and offensive contact, which was the food and milk hitting [his] face." However, in the Court's record, plaintiff's interrogatory responses are not complete and it is unclear whether they are signed or sworn to by plaintiff. At his 50-H hearing, plaintiff testified that he was "not real happy that Lieutenant Corbett threw that plate of food in my face and a glass of milk." Following this answer, there is only one additional page of testimony provided by defendant in which plaintiff testified further concerning the incident:

I wasn't real happy about the shunt being put in my neck, and I told them that they lied to me and I wasn't pleased with it, and I told him, and I said, Give me a phone. I'll call my lawyer and I'll have this thing out of my neck tomorrow, and he smashed a plate of food into my face and threw a glass of milk at me and said, Do you know how much money they've spent on you upstairs over that? And I said, I don't care.

When plaintiff was asked what he meant when he said that Corbett "smashed a plate of food into [his] face," he said "The plate was sitting on the table, and we were arguing back and forth across the table, and he smashed it on the edge and it flipped up in my face."

In an affidavit submitted in connection with defendants' motion, Lt. Corbett averred:

[Plaintiff] had recently returned from Saratoga Hospital, where he had a catheter inserted in his neck.... [Corbett] was advised by the on-duty nurse, R.N. Bilka, that [plaintiff]

became angry upon learning that he was to be separated from general population.... As [plaintiff] was extremely agitated about this move, [Corbett] was asked to speak with him to attempt to calm him down.

*10 Corbett further stated that when he entered plaintiff's cell, he was "quite angry." "[Plaintiff] claimed that the hospital had lied to him by telling him that he could remain in general population. [Plaintiff]'s anger continued to escalate and he began yelling and threatened to remove the catheter himself."

There was a metal table in the room that held [plaintiff]'s plate of food with a glass of milk. I sat across the table from [plaintiff] and reminded him that he was being separated from general population for his own safety. [Plaintiff's] temper was further escalated and I went to leave the holding cell to afford him the opportunity to calm down. When I rose from the table, my hand accidentally knocked into [plaintiff]'s glass of milk, spilling milk on both [plaintiff] and me. I had [plaintiff] moved to another holding cell so that the cell could be cleaned while he had a chance to calm down.

...

I understand that [plaintiff] has now alleged that I assaulted him by throwing the glass of milk at him during this incident. At no point, did I intentionally cause milk to spill on [plaintiff]. Had I acted in an aggressive manner towards [plaintiff] during that incident and physically assaulted him, the matter would have been reviewed by SCCF administration. Further, at no point did [plaintiff] complain of our interaction during his incarceration....

The force plaintiff describes herein not sufficiently serious or harmful to reach constitutional dimensions. See  [Romano v. Howarth](#), 998 F.2d 101, 105 (2d Cir.1993). Plaintiff does not maintain that he experienced any pain or injury as a result of the milk or food being allegedly thrown in his face, even assuming the incident occurred as he states. Moreover, plaintiff does not allege facts that show that Lt. Corbett used force "maliciously and sadistically to cause harm," rather than "in a good-faith effort to maintain or restore discipline" or calm him down and prevent him from removing his

catheter. *Hudson*, 503 U.S. at 7. “Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.”

Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.1973). Indeed, not even “every **malevolent** touch by a prison guard gives rise to a federal cause of action.” *Hudson*, 503 U.S. at 9. (emphasis added). Plaintiff has therefore not stated facts that meet either the objective or subjective component of the test used to determine whether Lt. Corbett's alleged excessive physical force constituted cruel and unusual punishment.

D. Qualified Immunity

Even if the above were not true, Lt. Corbett and the other individually named defendant are also protected against plaintiff's various § 1983 claims by qualified immunity.

As noted recently in the Supreme Court case of *Pearson v. Callahan*, 555 U.S.223, 129 S.Ct. 808, 815 (2009):

The doctrine of qualified immunity protects government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is “a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.” *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (KENNEDY, J., dissenting) (citing *Butz v. Economou*, 438 U.S. 478, 507 (1978) (noting that qualified immunity covers “mere mistakes in judgment, whether the mistake is one of fact or one of law”)).

*11 For example, excessive force claims are properly analyzed under the Fourth Amendment's “objective reasonableness standard,” because of the uncertainty and rapidity inherent in police work. *Graham v. O'Connor*, 490 U.S. 386, 396 (1989). Indeed, *Graham* sets forth a list of factors relevant to the merits of the constitutional excessive force claim which include analysis of the crime at issue, the threat posed by a suspect and any attempt by the suspect

to evade or resist arrest. *See id.* If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed. *See id.* “[T]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct.” *Saucier v. Katz*, 533 U.S. 194, 205 (2001), overruled on other grounds, *Pearson, supra*:

It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Id. Indeed:

[O]fficers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable, warrantless search,

Anderson v. Creighton, 483 U.S. 635 (1987)] still operates to grant officers immunity for reasonable mistakes as to the legality of their actions.

Id. at 206 (emphasis added).

In the circumstances presented to defendant Corbett who was asked to attempt to calm plaintiff who was threatening to pull out his catheter which medical personnel said could cause him to bleed to death, he was justified in using a degree of force to prevent plaintiff from harming himself. However, Lt. Corbett averred that no such force was necessary and that the spilled milk was simply an accident. While plaintiff's 50-H testimony indicated that defendant Corbett intentionally spilled milk and food on him, the Court's conclusion that no cause of action lies here is confirmed by the "uncontested fact that the force was not so excessive that [plaintiff] suffered hurt or injury." See  *Saucier, supra*, 533 U.S. at 208.

At the very least, defendants Buttofocco and Smith have established that reasonably competent police officers could disagree on the question of excessive force in this case. Based thereupon, the motion by defendants to dismiss plaintiff's claim of excessive force on the alternative ground of qualified immunity must be granted.

E. State Law Claims

1. Battery

***12** Defendants assert that plaintiff's cause of action for battery is barred by the statute of limitations. The normal statute of limitations for battery is one year. See  N.Y.C.P.L.R. § 215(3). However, in this case, the defendant is a municipal subdivision so the one-year period is extended per General Municipal Law by 90 days. See N.Y. Gen. Municipal Law 50-i. Thus, plaintiff was required to file his complaint within one year and ninety days from the date the alleged battery occurred. Here, plaintiff testified at his 50-H hearing that the battery occurred on the "day that [he] got the shunt put in [his] neck," which his medical records establish was May 21, 2009. Plaintiff testified that the incident with Lt. Corbett happened "as soon as he returned from the hospital," for the outpatient procedure. Plaintiff filed his Summons and Complaint in New York Supreme Court for Saratoga County on August 26, 2010. Accordingly, plaintiff's complaint was filed one year and 96 days after the alleged battery occurred. As such, the Court agrees his action for battery is time-barred as a matter of law and must be dismissed.

2. Negligence

Plaintiff claims that defendants were negligent in failing to address his medical needs at SCCF in three ways: first, that they ignored refused to follow the **dietary restrictions** set

by his nephrologist, Dr. Daoui; second, that they failed to timely address his **A.V. fistula**; and third, that they refused to allow him to shower following his catheter surgery which resulted in a septic infection. Fatal to plaintiff's claims is the absence of any expert medical evidence submitted in support of thereof. "Whether the claim is grounded in negligence or medical malpractice, '[w]here medical issues are not within the ordinary experience and knowledge of lay persons, expert medical testimony is a required element of a *prima facie case*'" *Myers v. State of New York*, 46 A.D.3d 1030, 1031 (3d Dep't 2007) (citing *Tatta v. State of New York*, 19 A.D.3d 817, 818 (3d Dep't 2005), *lv. denied* 5 N.Y.3d 712 (2005) quoting *Wells v. State of New York*, 228 A.D.2d 581, 582 (2d Dep't 1996), *lv denied* 88 N.Y.2d 814 (1996); see *Trottie v. State of New York*, 39 A.D.3d 1094, 1095 (3d Dep't 2007)). In *Myers*, the claimant inmate contended that medical personnel at the Sullivan Correctional Facility erred in the treatment of his **knee injury** by delaying necessary surgery. 46 A.D.3d at 1030. Specifically, the claimant alleged that he was required to undergo physical therapy, which he contended worsened his condition, instead of knee surgery, despite the medical personnel's knowledge that he had a foreign object lodged in his knee. *See id.* Following a trial, at which claimant was his only witness, the Court of Claims, in a written decision, dismissed the claim. *See id.* at 1030-31.

Plaintiff's claims of medical negligence are likewise subject to dismissal. Setting aside the proof offered by SCCF that its treatment of plaintiff was entirely reasonable and within the standards of care established by his own specialists, plaintiff has offered no expert medical evidence demonstrating that SCCF deviated from accepted standards of medical care and treatment in this case. Based thereupon, his claims of negligence or malpractice must be dismissed.

III. CONCLUSION

***13** Based on the foregoing, it is therefore

ORDERED that defendants' motion for summary judgment (Dkt.# 24) is hereby GRANTED and it is further

ORDERED that the complaint is dismissed in its entirety.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 838284

Footnotes

- ¹ The Court's Docket indicates that defense counsel initially served plaintiff's counsel, Mr. Grasso, with the present motion papers via the Court's mandated electronic filing system ("CM/ECF") system, unaware that he is exempt from use of the ECF system as he has been in practice for over fifty years. Mr. Grasso contacted the Court on September 12, 2012, requesting an extension due to his exemption and the fact that he had just received notice that a dispositive motion had been filed. Though defendants opposed his request, the Court granted Mr. Grasso's request for a thirty day extension to prepare responsive papers. Mr. Grasso did not file his response papers as ordered by October 12, 2012. On October 19, 2012, this Court received additional correspondence from defense counsel requesting that no further extensions be granted to Mr. Grasso and that the pending motion for summary judgment be granted in its entirety. Mr. Grasso did not respond to this correspondence. The Court granted the former request and denied the latter pending review of the motion on its merits. The Court has had no further communication with Mr. Grasso.

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KeyCite Yellow Flag - Negative Treatment
Clarified on Denial of Reconsideration by [Crichlow v. Fischer](#), W.D.N.Y.,
March 26, 2018

2017 WL 920753

Only the Westlaw citation is currently available.
United States District Court, W.D. New York.

Kevin Damion CRICHLOW, Plaintiff,

v.

Brian FISCHER et al., Defendants.

6:15-CV-06252 EAW

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Signed March 7, 2017

Attorneys and Law Firms

Kevin Damion Crichlow, Romulus, NY, pro se.

[Hillel David Deutsch](#), NYS Attorney General's Office
Department of Law, Rochester, NY, for Defendants.

DECISION AND ORDER

[ELIZABETH A. WOLFORD](#), United States District Judge

INTRODUCTION

*1 Plaintiff Kevin Damion Crichlow (“Plaintiff”) filed this action pursuant to 42 U.S.C. § 1983 in the Southern District of New York on October 16, 2012. (Dkt. 2). Plaintiff filed an amended complaint seeking relief against 136 Defendants on June 17, 2013. (Dkt. 12). The action was transferred to this Court on April 28, 2015. (Dkt. 168). The action was then severed by this Court on February 10, 2017. (Dkt. 223). Following severance, 35 Defendants (together “Defendants”) remain. (*See id.* at 5-6).

Presently before the Court are: Defendants' motion for summary judgment (Dkt. 177); Plaintiff's motion for discovery (Dkt. 182); Plaintiff's motion to appoint counsel (Dkt. 182); Plaintiff's motion for a stay (Dkt. 182); Plaintiff's motion for a medical exam (Dkt. 187); Plaintiff's motion for reconsideration (Dkt. 192); Plaintiff's motion to amend (Dkt. 192); Plaintiff's motion for a hearing (Dkt. 192); Defendants'

motion for sanctions (Dkt. 195); and Plaintiff's motion for sanctions (Dkt. 198).

For the reasons stated below, Defendants' motion for summary judgment is granted in part and denied in part; Plaintiff's motion for discovery is denied without prejudice; Plaintiff's motion to appoint counsel is denied without prejudice; Plaintiff's motion for a stay is denied without prejudice; Plaintiff's motion for a medical exam is denied; Plaintiff's motion for reconsideration is denied; Plaintiff's motion to amend is denied as moot; Plaintiff's motion for a hearing is denied; Defendants' motion for sanctions is denied without prejudice; and Plaintiff's motion for sanctions is denied.

I. Plaintiff's Allegations

Plaintiff's amended complaint spans 142 pages. (*See* Dkt. 12). Following severance of the action into three separate parts, this Court retained Plaintiff's claims in which he asserts violations of his constitutional rights by Defendants relating to Plaintiff's incarceration at the Wende Correctional Facility (“Wende”) and treatment at Wyoming Community Hospital. (*See* Dkt. 223).

Plaintiff alleges actions occurring at Wende beginning on or about September 27, 2008—the date Plaintiff was transferred to Wende—through his transfer to Eastern Correctional Facility on November 16, 2010. (*See* Dkt. 12 at 14-36; Dkt. 12-1 at 1-12).

Plaintiff alleges inadequate or nonexistent medical care throughout his incarceration at Wende, in violation of the Eighth Amendment. Plaintiff argues that he was not provided mental health treatment as required (Dkt. 12 at 19), and that he was “unreasonably exposed to infectious disease” (*id.* at 25, 36; Dkt. 188 at 35-36, 38-39). Plaintiff alleges deficient dental care from “2008 into 2013 at 3 [New York Department of Corrections and Community Supervision] prisons.” (Dkt. 12 at 36). He contends he was not provided care for “alot of pain hip, jaw, hand, tooth's also need replacement of four's lost teeths & restoration of function and ‘oral surgery & periodontics.’” (*Id.* at 31; *see, e.g.*, Dkt. 12-1 at 1). Plaintiff further alleges that he was denied dental care at Wende on June 30, 2008, to fix a “broken jaw.” (Dkt. 12 at 36). As to his medical care, Plaintiff states that Defendant George Boucher, M.D., was grossly negligent in misdiagnosing an injury to Plaintiff's hand, which led to Plaintiff's receiving the “wrong surgery” on January 13, 2010. (Dkt. 12-1 at 2). Plaintiff complains that he was denied treatment for “injuries

hip, back, shoulder, head” for “about 68 months.” (*Id.* at 3). Plaintiff also asserts that he was subjected to a risk of disease due to asbestos in Wende. (Dkt. 12 at 21-24, 31; Dkt. 188 at 35).

*2 Plaintiff also charges he was deprived of adequate nutrition and hygiene while incarcerated at Wende. Plaintiff claims that from April to September 2009, Defendants C.O. Bartels and C.O. Kevin Barlow “routinely deprived [Plaintiff] ... meaningful opportunities for yard, food, shower, exercise, adequately nutrition.” (Dkt. 12 at 25). He makes similar claims against Defendants C.O. Richard Brooks (“Brooks”) (*id.* at 32), and C.O. Alicia Humig (“Humig”) (*id.* at 26). Plaintiff complains that he was “taken off” of a mandatory religious diet for months because he was not allowed to go to the mess hall. (*Id.* at 32). Plaintiff also alleges that because he is H.I.V. positive, a nutritious diet is critical to his health, and he was deprived of such a diet. (Dkt. 12-1 at 1, 3). Plaintiff asserts that on November 11, 2009, Humig and Defendant Sergeant Paul Olszewski (“Olszewski”) refused to let him out of his cell, and placed him in keeplock for about six weeks. (Dkt. 12 at 32). Plaintiff further alleges that he was refused basic laundry services from 2008 through November 1, 2009. (*Id.* at 27).

Plaintiff complains that Defendant T.M.C. Christopher Zaluski (“Zaluski”) and others failed to provide reasonable accommodations for Plaintiff’s hearing disability. (Dkt. 12 at 14-16; Dkt. 12-1 at 1). Plaintiff alleges that he was in New York Department of Corrections and Community Supervision (“DOCCS”) custody for six months before receiving hearing aids. (Dkt. 12 at 30; Dkt. 12-1 at 1). He also claims that he was denied equal access to opportunities and recreation in Wende because of his hearing disability, and that the failure to accommodate his hearing disability was retaliation for his standing up for himself and other disabled inmates. (Dkt. 12 at 33-35; Dkt. 12-1 at 11-12).

Plaintiff claims he was harassed and verbally abused while at Wende. He alleges numerous instances of sexual harassment by Defendant C.O. Attea, and states that he reported such harassment to others, including the superintendent of Wende. (*Id.* at 17-18, 19, 31). Plaintiff claims that on June 18, 2010, Brooks verbally abused and threatened Plaintiff. (Dkt. 12-1 at 8-9). Plaintiff asserts C.O. Corey Petties verbally abused and threatened Plaintiff on July 12, 2010. (*Id.* at 9-10). Plaintiff alleges that DOCCS has a “common practice to encourage and further its employee’s, and officers

discrimination and harassment and assault and [deprivation] of proper nutrition.” (Dkt. 12 at 20).

Plaintiff also raises Fourteenth Amendment due process claims. Plaintiff complains of unspecified disciplinary proceedings that led a total of 180 days of disciplinary confinement between 2008 and 2010. (*Id.* at 29). Plaintiff claims his due process rights were violated because of the handling of “over 150” grievances filed through November 16, 2010, by Defendants Director Karen Bellamy (“Bellamy”) and Sergeant William Scott (“Scott”). (*Id.* at 27-30). Plaintiff asserts that he was retaliated against for filing grievances and that no investigations were conducted into his claims. (*Id.* at 28). Plaintiff states that he filed over 300 grievances. (Dkt. 209-3 at 8; *see, e.g.*, Dkt. 211 at 1).

He also alleges that on July 4, 2010, C.O. Hojsan destroyed Plaintiff’s legal documents in the Wende law library, thereby depriving Plaintiff of an opportunity to be heard by the courts. (Dkt. 12-1 at 10-11). Hojsan also allegedly denied Plaintiff access to the law library. (*Id.* at 11).

Plaintiff complains that a fire broke out in his cell block on April 12, 2010, and that the correctional officers in the area, including Olszewski, failed to respond to calls for help. (*Id.* at 6-7). Plaintiff claims that he was denied “fresh-air” and was thereafter denied medical care. (*Id.* at 7).

Plaintiff further contends that on some unspecified date Zaluski instructed others not to let Plaintiff out of his cell, in retaliation for Plaintiff’s filing of grievances against Zaluski. (Dkt. 12 at 30).

Plaintiff complains that Defendant Brian Fischer (“Fischer”) —the commissioner of DOCCS during Plaintiff’s incarceration at Wende—knew of constitutional violations against Plaintiff and failed to take action. (Dkt. 12-1 at 4-5). Plaintiff states that he personally sent “several letters” detailing inadequate health care and assault. (*Id.* at 4). Plaintiff also contends that Defendants “disregarded conditions posing an excessive risk to [his] health and safety ...,” and that prison staff was inadequately trained. (*Id.*).

II. Defendant’s Motion for Summary Judgment

A. Standard of Review

*3 Federal Rule of Civil Procedure 56 provides that summary judgment should be granted if the moving party establishes “that there is no genuine dispute as to any material

fact and the movant is entitled to judgment as a matter of law.” [Fed. R. Civ. P. 56\(a\)](#). The Court should grant summary judgment if, after considering the evidence in the light most favorable to the nonmoving party, the court finds that no rational jury could find in favor of that party. *See* [Scott v. Harris](#), 550 U.S. 372, 380 (2007) (citing [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 586-87 (1986)). The standard for granting summary judgment is the same whether the motion is made in lieu of an answer or after discovery has occurred. *See* [Anderson v. Rochester-Genesee Reg'l Transp. Auth.](#), 337 F.3d 201, 206 (2d Cir. 2003).

Once the moving party has met its burden, the opposing party “must do more than simply show that there is some metaphysical doubt as to the material facts.... [T]he nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial*.” [A. Caldarola v. Calabrese](#), 298 F.3d 156, 160 (2d Cir. 2002) (emphasis in original) (quoting [Matsushita Elec.](#), 475 U.S. at 586-87). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment....” [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 247-48 (1986) (emphasis in original).

“[A] party may file a motion for summary judgment at any time until 30 days after the close of all discovery.” [Fed. R. Civ. P. 56\(b\)](#). But, summary judgment is generally not appropriate until after some discovery has occurred. *See* [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322 (1986) (stating that summary judgment is appropriate on the proper showing “after adequate time for discovery”); *see, e.g.*, [Hellstrom v. U.S. Dep't of Veterans Affairs](#), 201 F.3d 94, 97 (2d Cir. 2000) (“[S]ummary judgment should only be granted if *after discovery*, the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof.” (emphasis original) (internal quotation marks and citations omitted)). “Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery.” [Hellstrom](#), 201 F.3d at 97; *see also*

[Trebzor Sportswear Co. v. The Ltd. Stores, Inc.](#), 865 F.2d 506, 511 (2d Cir. 1989) (“The nonmoving party should not be

‘railroaded’ into his offer of proof in opposition to summary judgment.” (citing [Celotex](#), 477 U.S. at 326)).

B. Statute of Limitations

Defendants argue that some of Plaintiff’s claims are time-barred by the statute of limitations. (Dkt. 177-5 at 3). “In [§] 1983 actions, the applicable limitations period is found in the ‘general or residual state statute of limitations for personal injury actions....’” [Pearl v. City of Long Beach](#), 296 F.3d 76, 79 (2d Cir. 2002) (quoting [Owens v. Okure](#), 488 U.S. 235, 249-50 (1989)). A § 1983 action filed in New York is subject to a three-year statute of limitations. [Hogan v. Fischer](#), 738 F.3d 509, 517 (2d Cir. 2013).

Here, Plaintiff filed this action October 16, 2012. (Dkt. 1). Therefore, any claim arising before October 16, 2009, is barred by the statute of limitations. Plaintiff points to the “continuing violation doctrine” to save his otherwise time-barred claims. (Dkt. 209-3 at 21-22).

[The continuing violation doctrine] applies to claims composed of a series of separate acts that collectively constitute one unlawful practice. The continuing violation doctrine thus applies not to discrete unlawful acts, even where those discrete acts are part of a serial violation, but to claims that by their nature accrue only after the plaintiff has been subjected to some threshold amount of mistreatment. Accordingly, where the continuing violation doctrine applies, the limitations period begins to run when the defendant has engaged in enough activity to make out an actionable claim. A claim will be timely, however, only if the plaintiff alleges some non-time-barred acts contributing to the alleged violation.

*4 [Gonzalez v. Hasty](#), 802 F.3d 212, 220 (2d Cir. 2015). Although the continuing violation doctrine generally applies to claims “composed of a series of separate acts that

collectively constitute one unlawful practice," *id.* at 220, a plaintiff "must allege both the existence of an ongoing policy of discrimination and some non-time-barred acts taken in furtherance of that policy." *Fahs Constr. Grp., Inc. v. Gray*, 725 F.3d 289, 292 (2d Cir. 2013) (quoting *Harris v. City of N.Y.*, 186 F.3d 243, 250 (2d Cir. 1999)); *see, e.g.*, *Shomo v. City of N.Y.*, 579 F.3d 176, 182 (2d Cir. 2009).

Here, Plaintiff alleges four patterns of conduct which occurred both before and after October 16, 2009: (1) denial of adequate medical and dental treatment; (2) denial of adequate nutrition and hygiene; (3) discrimination and failure to accommodate based on Plaintiff's disability; and (4) denial of due process rights.

The continuing violation doctrine applies to Eighth Amendment claims for deliberate indifference to medical needs. *See* *Shomo*, 579 F.3d at 182 ("[T]he continuing violation doctrine can apply when a prisoner challenges a series of acts that together comprise an Eighth Amendment claim of deliberate indifference to serious medical needs."). Plaintiff raises a number claims that he was denied adequate medical and dental treatment, which, taken together, could comprise an Eighth Amendment claim for deliberate indifference to serious medical needs. Plaintiff also complains of ongoing deprivations of adequate food and access to showers and laundry. Prison officials' Eighth Amendment obligations require that they "ensure that inmates receive adequate food, shelter, and medical care...." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

Defendants argue that Plaintiff failed to allege the existence of a policy of deliberate indifference. (Dkt. 196-2 at 10). The Court disagrees. Plaintiff's amended complaint includes allegations that senior prison officials, including Fischer, knew of ongoing violations related to Plaintiff's inadequate health care but failed to take action. Plaintiff claims he sent letters to Fischer to point out the inadequacies of his health care at Wende. Plaintiff also attaches a reply letter from Bellamy in which Bellamy states that she is responding to Plaintiff's letters on behalf of "governor Cuomo and Commissioner Fischer." (Dkt. 209-4 at 2). Plaintiff also asserts that the practices complained of "are widespread, longstanding, and deeply embedded in the culture of all [DOCCS] agenc[ies], constitut[ing] unwritten [DOCCS] policies & customs." (Dkt. 12-1 at 5).

Similarly, the amended complaint can be read as alleging a continuing violation as to Defendants' indifference to Plaintiff's nutrition and hygiene needs. Plaintiff alleges that he was routinely deprived of meaningful opportunities to shower and exercise, and was not provided adequate nutrition. (Dkt. 12 at 25; *see, e.g.*, *id.* at 26). Plaintiff states that while he was in keeplock, corrections officers were told not to feed him. (*Id.* at 26). He also claims that he was only allowed to shower six times in a nine-month period, and that "his clothing and linen's [sic] were never laundered." (*Id.* at 27).

Plaintiff's allegations are sufficient to establish a plausible claim of "an ongoing policy of deliberate indifference and acts taken in accordance with that policy." *See Taylor v. Goord*, Civil Action No. 9:09-CV-1036 (FJS/DEP), 2010 WL 3825661, at *7 (N.D.N.Y. Sept. 2, 2010), *report and recommendation adopted by* No. 9:09-CV-1036 (FJS/DEP), 2010 WL 3825656 (N.D.N.Y. Sept. 24, 2010). Cf. *Bussey v. Fischer*, Civil Action No. 9:10-CV-1021 (NAM/DEP), 2011 WL 4862478, at *5 (N.D.N.Y. Aug. 1, 2011) (finding a plaintiff failed to allege an ongoing policy of deliberate indifference sufficient to show a continuing violation where the alleged unwritten policy was inconsistent with written policies and requirements), *report and recommendation adopted by* No. 9:10-CV-1021 (NAM/DEP), 2011 WL 4499324 (N.D.N.Y. Sept. 27, 2011). Thus, particularly at this stage of the proceedings, Plaintiff's pre-October 16, 2009, claims as to inadequate medical and dental treatment, as well as inadequate food and hygiene, survive Defendants' statute of limitations defense.

*5 Similarly, Plaintiff alleges ongoing discrimination because of his hearing disability in violation of the Eighth and Fourteenth Amendments, as well as the "Rehabilitation Act" and the Americans with Disabilities Act.¹ (Dkt. 12-1 at 1). Plaintiff alleges a pattern of discriminatory conduct, arguing that DOCCS and individual Defendants at Wende failed to accommodate his hearing disability. The last complained-of act of discrimination at Wende occurred on August 18, 2010, well within the three-year statute of limitations. Plaintiff alleges that prison staff at Wende continuously failed to provide him reasonable accommodations, such as providing working hearing aids. Plaintiff also states that other disabled prisoners were not provided reasonable accommodations. Such *pro se* allegations are sufficient, at this stage, to state the existence of an ongoing policy of disability discrimination against Plaintiff.

Plaintiff also claims due process violations related to the processing of his grievances and disciplinary hearings. In this context, the continuing violation doctrine does not apply to Plaintiff's Fourteenth Amendment due process claims because “[e]ach decision made without due process is a discrete violation, and the statute of limitations begins to run from the date that the plaintiff was denied the full and fair hearing he was entitled to.” *Bunting v. Fischer*, 14-CV-0578-RJA-MJR, 2016 WL 4939389, at *3 (W.D.N.Y. Aug. 4, 2016) (citing *Gonzalez*, 802 F.3d at 223), report and recommendation adopted by 14-CV-578A, 2016 WL 4804099 (W.D.N.Y. Sept. 14, 2016). Thus, all of Plaintiff's claimed due process violations which occurred before October, 16, 2009, are subject to the statute of limitations and must be dismissed.

In sum, at this stage in the proceedings, Plaintiff's claims of deliberate indifference to medical care, inadequate food and hygiene, and the failure to provide reasonable accommodations for his hearing disability all survive Defendants' statute of limitations challenge. Plaintiff's due process claims which are based on the processing of his grievances and which arose before October 16, 2009, are time barred and must be dismissed.

C. Failure to Exhaust Administrative Remedies

Next, Defendants argue that many of Plaintiff's claims must be dismissed for failure to exhaust administrative remedies. (Dkt. 177-5 at 4-6). An inmate's failure to exhaust administrative remedies is properly considered on a motion for summary judgment made in lieu of an answer. See *Crenshaw v. Syed*, 686 F. Supp. 2d 234, 236 (W.D.N.Y. 2010) (granting a summary judgment motion made in lieu of answer where inmate failed to exhaust administrative remedies).

Pursuant to  42 U.S.C. § 1997e, “[n]o action shall be brought with respect to prison conditions under  § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”  42 U.S.C. § 1997e(a).

To satisfy that requirement, prisoners in New York must ordinarily follow a three-step [DOCCS] grievance process. The first step in that process is the filing of a grievance with the Inmate Grievance

Resolution Committee. Next, the inmate may appeal an adverse decision to the prison superintendent. Finally, the inmate may appeal the superintendent's decision to the Central Office Review Committee (“CORC”). In general, it is only upon completion of all three levels of review that a prisoner may seek relief in federal court under  § 1983.

Crenshaw, 686 F. Supp. 2d at 236 (citations omitted). “Exhaustion is mandatory—unexhausted claims may not be pursued in federal court.”  *Amador v. Andrews*, 655 F.3d 89, 96 (2d Cir. 2011). “[D]efendants bear the burden of proof and prisoner plaintiffs need not plead exhaustion with particularity.”   *McCoy v. Goord*, 255 F. Supp. 2d 233, 248 (S.D.N.Y. 2003). Pursuant to the Second Circuit's decision in  *Hemphill v. New York*, 380 F.3d 680 (2d Cir. 2004), a failure to exhaust administrative remedies may be excused where: “(1) the administrative remedies were not in fact available; [or] (2) prison officials have forfeited, or are estopped from raising, the affirmative defense of non-exhaustion; or (3) ‘special circumstances justify the prisoner's failure to comply with administrative procedural requirements.’ ” *Dabney v. Pegano*, 604 Fed.Appx. 1, 3 (2d Cir. 2015) (quoting  *Hemphill*, 380 F.3d at 686). However, the third prong of *Hemphill*, relating to “special circumstances” was abrogated by the Supreme Court's decision in  *Ross v. Blake*, 136 S. Ct. 1850 (2016).  *Williams v. Corr. Officer Priatno*, 829 F.3d 118, 123 (2d Cir. 2016). The inquiry which used to be under the third prong of *Hemphill*, is now considered “entirely within the context of whether administrative remedies were actually available to the aggrieved inmate.” *Id.*

*6 Here, Plaintiff claims he filed over 300 grievances, and seems to suggest that this is sufficient to exhaust his administrative remedies. (See Dkt. 209-3 at 8; see, e.g., Dkt. 211 at 1). Plaintiff misunderstands the exhaustion requirement. The filing of a grievance is but the first step in exhausting administrative remedies. To exhaust DOCCS administrative remedies, a prisoner must appeal to CORC. Plaintiff's filing of 300 grievances, even if true, is insufficient to exhaust his remedies under  § 1997e.

In response to Defendants' assertion that Plaintiff failed to exhaust his administrative remedies for most of his claims, Plaintiff claims that DOCCS lost or destroyed his grievances. (Dkt. 209-3 at 19 (claiming that DOCCS destroyed meritorious grievances); Dkt. 211 at 1 (same). "Plaintiff's wholly conclusory and unsupported allegations that grievances are tampered with at [Wende] do not create a material issue of fact in this case." See *Mims v. Yehl*, Nos. 13-CV-6405-FPG, 14-CV-6304-FPG, 14-CV-6305-FPG, 2014 WL 4715883, at *4 (W.D.N.Y. Sept. 22, 2014).

However, Defendants' submissions show that Plaintiff has satisfied the exhaustion requirement for some potential claims. Defendants' sworn declaration from Jeffery Hale—the Assistant Director of the DOCCS Inmate Grievance Program—states that Plaintiff exhausted 25 grievances between the beginning of his incarceration in 2008 and the filing of this action in October 2012. (Dkt. 177-3 at 2). Of those 25 exhausted grievances, 23 relate to Plaintiff's incarceration at Wende. (See *id.* at 5-6). Defendants provide only a printout listing the titles and grievance numbers of the 23 exhausted grievances that arose at Wende (*see id.*); they did not submit any paperwork relating to the grievances themselves or the final resolution of any exhausted grievance. (See Dkt. 177).

Plaintiff clearly exhausted some potential claims which could be raised in federal court pursuant to  § 1997e. However, the Court cannot determine whether the claims Plaintiff raises in this action are those which have been exhausted because neither party submitted sufficient information which would allow the Court to make such a determination. It is possible that none of Plaintiff's exhausted grievances relate to the named Defendants in this action; it is equally possible that all 23 exhausted grievances relate to actions taken by the named Defendants. Since Defendants seek summary judgment on this basis, it is their burden to establish the lack of any issue of material fact on the exhaustion argument. They have failed to meet this burden. Thus, Defendants' motion based upon Plaintiff's alleged failure to exhaust is denied.

D. Plaintiff's Due Process Claims

Regardless of whether grievances were exhausted or whether the claims were timely asserted, Plaintiff's due process claims relating to disciplinary confinement and grievance processing fail as a matter of law and summary judgment is appropriate.

1. SHU Confinement

Plaintiff alleges due process claims related to disciplinary proceedings which led to disciplinary confinement. (Dkt. 12 at 29). "[A] prisoner asserting a  § 1983 claim for denial of due process at a disciplinary hearing must first identify a liberty interest protected by the Due Process Clause of which he was deprived, and then show that he was deprived of that interest without due process of law." *Aguirre v. Kendra*, 123 F. Supp. 3d 419, 422 (W.D.N.Y. 2015). "Prison discipline implicates a liberty interest when it 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'"  *Ortiz v. McBride*, 380 F.3d 649, 654 (2d Cir. 2004) (quoting  *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). Where a prisoner alleges that he was confined to the Special Housing Unit ("SHU") as the result of a disciplinary hearing, the court considers how long the confinement lasted, along with "the conditions of the prisoner's segregated confinement relative to the conditions of the general prison population," in determining whether a liberty interest is implicated. *Vasquez v. Coughlin*, 2 F. Supp. 2d 255, 259 (N.D.N.Y. 1998). "Both the conditions and their duration must be considered, since especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical."  *Sealey v. Giltner*, 197 F.3d 578, 586 (2d Cir. 1999) (internal citation omitted).

*7 There is no "bright line rule that a certain period of SHU confinement automatically fails to implicate due process rights."  *Palmer v. Richards*, 364 F.3d 60, 64 (2d Cir. 2004). However, the Second Circuit has held that confinement for fewer than 101 days under "normal" SHU conditions does not amount to an atypical and significant hardship and thus does not implicate a liberty interest under the Due Process Clause.  *Ortiz*, 380 F.3d at 654-55; see also  *Tafari v. McCarthy*, 714 F. Supp. 2d 317, 375 (N.D.N.Y. 2010) (stating that SHU confinements of up to 90 days "fall within the 'short range' of disciplinary confinement and thus implicate a liberty interest only if 'the conditions were more severe than the normal SHU conditions.'") (quoting  *Palmer*, 364 F.3d at 65)).

Here, Defendants argue that none of Plaintiff's disciplinary confinements violated Plaintiff's due process rights. (Dkt.

177-5 at 6-7). Defendants submitted Plaintiff's prison disciplinary record. (See Dkt. 177-4). The records show Plaintiff was subjected to only one non-time-barred SHU confinement at Wende. (See *id.* at 8). That SHU confinement was for 30 days. (*Id.*). Plaintiff does not argue that the conditions of his confinement were in any way abnormal or atypical. Because Plaintiff's disciplinary confinement fell within the "short" range and did not involve any abnormalities, it did not implicate any liberty interest sufficient to raise a due process violation. Plaintiff's due process claims as to disciplinary confinement at Wende fail as a matter of law.

2. Grievance Processing

Plaintiff also raises due process complaints about the handling of his grievances. (See Dkt. 12 at 27-30; Dkt. 209-2 at 21). It is well-established that inmates do not have a protected liberty interest in the processing of their prison grievances. *See Torres v. Mazzuca*, 246 F. Supp. 2d 334, 342 (S.D.N.Y. 2003). "[Although] there is a First Amendment right of meaningful access to the courts and a right to petition the government for redress, inmate grievance procedures are not required by the Constitution and therefore a violation of such procedures does not give rise to a claim under § 1983." *Cancel v. Goord*, No. 00 CIV 2042 LMM, 2001 WL 303713, at *3 (S.D.N.Y. Mar. 29, 2001) (internal citations omitted).

Plaintiff has no liberty interest in the prison grievance program. Even if Defendants violated their own procedures in processing Plaintiff's grievances, Plaintiff cannot find relief under § 1983. A prisoner may raise due process claims related to disciplinary hearings. *Montalvo v. Lamy*, 139 F. Supp. 3d 597, 608 (W.D.N.Y. 2015); *Richard v. Fischer*, 38 F. Supp. 3d 340, 358-59 (W.D.N.Y. 2014). However, Plaintiff's allegations here relate only to allegedly faulty grievance processing; Plaintiff makes no allegations of due process violations related to disciplinary hearings. Therefore, these claims fail as a matter of law.

Plaintiff's only claim against Defendants Bellamy and Scott are the due process claims related to the grievance process. Because Plaintiff's claims fail, Defendants Bellamy and Scott must be dismissed from the action.

E. Retaliation

Finally, Plaintiff alleges that he was retaliated against because he filed grievances. (Dkt. 12 at 28).

A prisoner has a substantive due process right not to be subjected to false misconduct charges as retaliation for his exercise of a constitutional right such as petitioning the government for redress of grievances. Retaliating against inmates for filing grievances by filing false disciplinary reports violates the First Amendment. In fact, our Circuit has held that the filing of a false disciplinary report is a serious enough action that temporal proximity between an inmate grievance and the filing of a report is enough to state a retaliation claim. Accordingly, a plaintiff can establish a causal connection that suggests retaliation by showing that protected activity was close in time to the adverse action.

*8 *Richard v. Fischer*, 38 F. Supp. 3d 340, 358 (W.D.N.Y. 2014) (internal quotation marks and citations omitted). Here, Plaintiff asserts that because of his filing of numerous grievances, unspecified Defendants retaliated by filing false misbehavior reports. (See Dkt. 12 at 28). Defendants have not raised any argument related to Plaintiff's retaliation claim. (See Dkt. 177-5). Therefore, the Court will not dismiss the retaliation claim.

F. Summary

For the foregoing reasons, Defendants' motion for summary judgment is granted with respect to Plaintiff's alleged due process claims, but is denied as to Plaintiff's Eighth Amendment claims related to the alleged denial of adequate medical treatment and adequate food and nutrition, and it is also denied with respect to Plaintiff's claims alleging retaliation and the failure to provide reasonable accommodations for Plaintiff's disability.

III. Plaintiff's Motion for Discovery

Plaintiff moves this Court to open discovery. (Dkt. 182). Plaintiff states that he is "asking for interrogatory answers

and other evidence [to] show that the material facts are in dispute.” (*Id.* at 2). Plaintiff also states that discovery will allow him to show that he filed “over 300 grievances.” (*Id.*).

The Court construes Plaintiff’s motion as one under [Fed. R. Civ. P. 56\(d\)](#). In opposing a summary judgment motion, if a nonmovant “shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” [Fed. R. Civ. P. 56\(d\)](#).

A party seeking to delay resolution of a summary judgment motion on grounds that he has been deprived of certain discovery materials “must show that the material sought is germane to the defense, and that it is neither cumulative nor speculative, and a bare assertion that the evidence supporting a plaintiff’s allegation is in the hands of the defendant is insufficient.”

Alphonse Hotel Corp. v. Tran, 828 F.3d 146, 151 (2d Cir. 2016) (quoting  *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994)).

Here, Plaintiff has not submitted any sworn affidavit or declaration requesting particular information, nor has he described how the material requested is germane to his defense related to the due process claims (the only claims on which the Court has granted summary judgment). As discussed above, the due process claims are barred as a matter of law, and Plaintiff has not made a showing that discovery would alter that conclusion. Therefore, the motion for discovery is denied without prejudice to Plaintiff seeking discovery with respect to the claims that remain.

IV. Plaintiff’s Motion to Appoint Counsel

As part of Plaintiff’s motion for discovery, he also moves this Court to appoint counsel “to assist [Plaintiff] in preparing his case....” (Dkt. 182 at 5). Under  [28 U.S.C. § 1915\(e\)](#), the Court may appoint counsel to assist indigent litigants, *see, e.g., Sears, Roebuck & Co. v. Charles Sears Real Estate, Inc.*, 865 F.2d 22, 23-24 (2d Cir. 1988), and the assignment of *pro bono* counsel in civil cases is within the trial court’s discretion.  *In re Martin-Trigona*, 737 F.2d 1254, 1260 (2d Cir. 1984). The court must evaluate “the merits of [the] plaintiff’s case, the plaintiff’s ability to pay for private counsel, his efforts to obtain a lawyer, the availability of counsel, and

the plaintiff’s ability to gather the facts and deal with the issues if unassisted by counsel.” *Cooper v. A. Sargent Co., Inc.*, 877 F.2d 170, 172 (2d Cir. 1989). Particular attention must be paid to the merits of the plaintiff’s claim. *Id.* (“Even where the claim is not frivolous, counsel is often unwarranted where the indigent’s chances of success are extremely slim.” (quoting  *Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986))). Additionally, for prison inmates, the court must also give weight to the plaintiff’s lack of practical access to attorneys. *Id.* at 173-74.

*9 Plaintiff was in prison when he filed the complaint, and remains in custody. (*See* Dkt. 1; Dkt. 4). Plaintiff has already been granted *in forma pauperis* status in this case. (Dkt. 5). In his *in forma pauperis* motion, Plaintiff stated that he was incarcerated, had not worked in the past 12 months, and did not have any cash or other assets. (Dkt. 4 at 1-2). A prison official certified that Plaintiff’s average account balance for the previous six months was \$1.07. (*Id.* at 3). Plaintiff has conclusively shown that he is indigent, and has met the threshold test for appointing counsel.

However, the *Cooper* factors all weigh against appointing counsel at this time. Plaintiff’s motion papers provide no information suggesting that he attempted to obtain counsel to assist in his case. (*See* Dkt. 182 at 5). As the Second Circuit has noted, “[t]he vast majority of litigation on behalf of personal claimants is financed initially by lawyers who accept the representation for a contingent fee in the expectation of being rewarded by a share of the winnings.” *Cooper*, 877 F.2d at 173. In the absence of an affirmative statement by Plaintiff otherwise, the Court assumes that he has not sought an attorney to represent him. This weighs against the appointment of counsel.

The Court also finds that the Plaintiff has failed to show anything more than a remote possibility of success on the merits. Plaintiff’s ultimate success on the merits faces significant hurdles, including Defendants’ defense that Plaintiff failed to exhaust his administrative remedies. This too weighs heavily against the appointment of counsel.

Balancing the factors set forth in *Cooper*, the Court finds that appointing counsel is inappropriate at this time, and Plaintiff’s motion is denied without prejudice.

V. Plaintiff’s Motion for a Stay

Plaintiff moves this Court to stay the action while he undergoes surgery on his wrist, arm, and back. (Dkt. 182 at 6). Plaintiff does not disclose the date of the surgery, or any further information which would allow the Court to evaluate the necessity of such a stay. (*See id.*). Plaintiff has not sufficiently shown a need for a stay in the litigation. Therefore, the motion is denied without prejudice.

VI. Plaintiff's Motion for a Medical Exam

Plaintiff asks this Court, pursuant to [Fed. R. Civ. P. 35](#), to order a medical examination so that he can access medical care for currently occurring medical issues. (Dkt. 187). [Rule 35](#) permits a court to order “a party whose ... condition ... is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody....” [Fed. R. Civ. P. 35](#). “In order to obtain a medical examination under [Rule 35](#), the moving party must establish ‘good cause....’” *Kelly v. Times/review Newspapers Corp.*, CV 14-2995 (JMA) (SIL), [2016 WL 2901744](#), at *1 (E.D.N.Y. May 18, 2016). “‘Rule 35 does not, however, authorize a party to file a motion for his own physical examination.’ Neither may a plaintiff invoke [Rule 35](#) in order to receive medical care.” *Rodriguez v. Conway*, No. 10-CV-6243L, [2011 WL 4829725](#), at *3 (W.D.N.Y. Sept. 6, 2011) (citations omitted), *affirmed in relevant part by* No. 10-CV-6243L, [2011 WL 4829869](#) (W.D.N.Y. Oct. 12, 2011).

Here, Plaintiff’s current medical condition is not “in controversy.” Plaintiff has already submitted records regarding his medical and dental maladies for the time period at issue in this action. (*See* Dkt. 209-5 at 1-27). Defendants have in no way challenged the substance of Plaintiff’s claimed medical needs during his incarceration at Wende from 2008 to 2010. Further, Plaintiff cannot use [Rule 35](#) to receive medical care. Therefore, Plaintiff’s motion is denied.

VII. Plaintiff's Motion for Reconsideration

***10** Plaintiff titles his motion at Dkt. 192 as a “motion for reconsideration,” however, he does not point to any order or decision of the Court for which he seeks reconsideration. Although the Court has the inherent power to reconsider and modify interlocutory orders prior to the entry of judgment, *see Fed. R. Civ. P. 54(b)* (“[A]ny order or other ... that adjudicates fewer than all the claims ... does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.”); *Williams v. Cty. of Nassau*,

[779 F. Supp. 2d 276, 280 & n.2 \(E.D.N.Y. 2011\)](#) (“A district court retains absolute authority to reconsider or otherwise affect its interlocutory orders any time prior to appeal.”), *aff’d*, [581 Fed.Appx. 56](#) (2d Cir. 2014), Plaintiff has not provided sufficient information to allow the Court to decide his motion. Therefore, Plaintiff’s motion is denied.

VIII. Plaintiff's Motion to Amend

Plaintiff also filed a motion which, in essence, asks the Court to allow Plaintiff to amend his response to Defendants’ motion for summary judgment. (Dkt. 192). The Court granted such relief already (Dkt. 208), and Plaintiff already filed amended response papers (Dkt. 209; Dkt. 211). Therefore, Plaintiff’s motion is denied as moot because he has already received the requested relief.

IX. Plaintiff's Motion for a Hearing

Plaintiff further asks the Court to hold a hearing “to cover several issue[s] that Plaintiff [does not] fully[] understand.” (Dkt. 192 at 3). Plaintiff also seeks scheduling conferences or orders pursuant to [Fed. R. Civ. P. 16\(b\)](#) and [26\(f\)](#). The Court finds that neither a hearing nor a scheduling order is necessary at this time. If Plaintiff has legal questions, he may retain an attorney or do further legal research to answer those questions. It is not the Court’s role to answer such questions. Thus, Plaintiff’s motion is denied. Once an answer is filed, the case will proceed to discovery.

X. Defendant's Motion for Sanctions

Defendants move this Court to impose sanctions on Plaintiff pursuant to [Fed. R. Civ. P. 11](#). (Dkt. 195). Defendants argue that, as part of his response to the motion for summary judgment, Plaintiff filed a grievance exhausted by another inmate, claiming the grievance as one Plaintiff had himself exhausted. (Dkt. 195-2 at 1-2 (citing Dkt. 188-8 at 2)). Plaintiff allegedly did so in an attempt to show that the Jeffery Hale declaration was knowingly false and that Defendants had destroyed Plaintiff’s grievances. (*Id.* (citing Dkt. 188 at 12)).

A party or counsel for a party is required by the Federal Rules of Civil Procedure to certify that, to the best of their knowledge, the factual contentions made have evidentiary support. [Fed. R. Civ. P. 11\(b\)\(3\)](#). [Rule 11](#) allows the court to “impose an appropriate sanction on any attorney, law firm, or party that violated [[Rule 11\(b\)](#)] or is responsible for the violation.” [Fed. R. Civ. P. 11\(c\)\(1\)](#). “Sanctions may be—

but need not be—imposed when court filings are used for an ‘improper purpose,’ or when claims are not supported by existing law, lack evidentiary support, or are otherwise frivolous.” *Ipcon Collections LLC v. Costco Wholesale Corp.*, 698 F.3d 58, 63 (2d Cir. 2012) (citation omitted). “Further, even when a district court finds a violation of Rule 11, ‘the decision whether to impose a sanction is committed to the district court’s discretion.’ ” *Id.* (quoting *Perez v. Posse Comitatus*, 373 F.3d 321, 325 (2d Cir. 2004)).

Defendants argue that “the only appropriate sanction in this matter is dismissal.” (Dkt. 195-2 at 3). The Court disagrees. The grievance at issue relates to a complaint which arose during 2012 and 2013. (Dkt. 188-8 at 2). Even if Plaintiff was the grievant, the grievance itself would be irrelevant to this Court’s inquiry into Plaintiff’s incarceration conditions from 2008 until 2010. Indeed, the grievance at issue was not taken into account during the Court’s review of the motion for summary judgment because it is irrelevant to the time frame at issue. Further, although the filing of false documents in bad faith to a court can, in egregious cases, result in dismissal,

see  *Ceglia v. Zuckerberg*, No. 10-CV-00569A(F), 2013 WL 1208558 (W.D.N.Y. 2013), report and recommendation adopted by 2014 WL 1224574 (W.D.N.Y. 2014), aff’d, 600 Fed.Appx. 34 (2d Cir. 2015), such an extreme sanction is not warranted at this time. However, **Plaintiff is hereby warned that any future violation of Rule 11 may result in dismissal of the action or other appropriate sanctions.**

*11 Defendants’ motion is denied without prejudice.

XI. Plaintiff’s Motion for Sanctions

Finally, Plaintiff asks this Court to impose sanctions on Defendants for making materially misleading and false statements to the Court in its response in opposition (Dkt. 174) to Plaintiff’s letter motion (Dkt. 172). (Dkt. 198). The Court denied Plaintiff’s motion as unrelated to the claims at issue in this action. (Dkt. 176).

Read generously, Plaintiff argues that Defendants’ counsel failed to acknowledge in his response that one of the individuals named in the letter motion was also a named Defendant in this action. (*See* Dkt. 198 at 1-2). Such a misstatement is immaterial and does not warrant sanctions.

As Plaintiff failed to assert any material violation of Rule 11, sanctions are inappropriate, and Plaintiff’s motion is denied.

CONCLUSION

For the foregoing reasons, the Court

GRANTS IN PART AND DENIES IN PART Defendants’ motion for summary judgment (Dkt. 177);

INSTRUCTS the Clerk of Court to terminate Defendants Bellamy and Scott from this action;

DIRECTS Defendants to answer the complaint within 30 days of the filing of this Decision and Order;

DENIES Plaintiff’s motion for discovery (Dkt. 182) without prejudice;

DENIES Plaintiff’s motion to appoint counsel (Dkt. 182) without prejudice;

DENIES Plaintiff’s motion for a stay (Dkt. 182) without prejudice;

DENIES Plaintiff’s motion for a medical exam (Dkt. 187);

DENIES Plaintiff’s motion for reconsideration (Dkt. 192);

DENIES Plaintiff’s motion to amend (Dkt. 192) as moot;

DENIES Plaintiff’s motion for a hearing (Dkt. 192);

DENIES Defendants’ motion for sanctions (Dkt. 195) without prejudice; and

DENIES Plaintiff’s motion for sanctions (Dkt. 198).

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 920753

Footnotes

- ¹ Defendants have not made any statute-of-limitations arguments regarding Plaintiff's claims under the Rehabilitation Act or the Americans with Disabilities Act. (See Dkt. 177-5 at 3). Thus, the Court only addresses Defendants' statute-of-limitation argument as it relates to Plaintiff's constitutional claims of discrimination under  § 1983.

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